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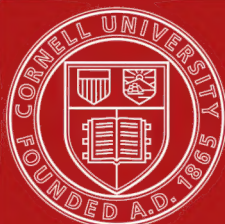
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A TREATISE  
ON THE LAW OF  
TRUSTS AND TRUSTEES

BY  
JAIRUS WARE PERRY

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FIFTH EDITION  
EMBODYING RELEVANT CASES DOWN TO DATE

By JOHN M. GOULD

IN TWO VOLUMES

VOL. II.

BOSTON  
LITTLE, BROWN, AND COMPANY  
1899

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§ 473. WHERE an express trust is created, certain powers are conferred upon the trustees to be executed by them. These powers are divided in the first instance into *general* and *special* powers. General powers are those which, by construction of law, are incident to the *office* of trustee. Every trustee must have them, whether they are named or not in the instrument creating the trust, in order that he may perform the duties imposed upon him. Special powers are such special directions and authority as the settlor gives to his trustees in order to carry out his special purposes in instituting the trust. Special powers are again divided into mere naked powers, — to be exercised by trustees at their sole discretion, and according to their own judgment, and to be forever discharged and obsolete, if the trustees do not see fit to execute them, — and powers in the nature of a trust. These latter powers are sometimes coupled with an interest, and sometimes not. But if they are in the nature of a trust, they are imperative on the trustees, and must be executed. If the trustees neglect or refuse to execute them, or die without performing them, courts of equity will execute them, or compel them to be executed. In considering this subject, the rules governing mere naked powers, and powers in the nature of a trust, will first be stated. The nature of general powers, and the rules that regulate their performance, will next be noticed. Special powers, and the rules applicable to them, will then be discussed, and the time when, and the persons by whom, they may be executed. It must be observed, that, in all cases, powers must be construed accord-



ing to the intention of the party creating them, if such intention is compatible with the rules of law; and such intention must be determined from the instrument.<sup>1</sup>

§ 474. It must be observed, in the first instance, that whatever powers may be possessed by trustees, whether general or special, if the trust is before the court and a *decree* has been made, the powers of the trustees are thenceforth so far changed that they must have the sanction of the court for all their acts.<sup>2</sup> (a) They cannot begin nor defend any suit without leave of the court;<sup>3</sup> they cannot sell,<sup>4</sup> nor make repairs,<sup>5</sup> nor make investments,<sup>6</sup> nor pay debts without consulting the court.<sup>7</sup> But there must be a *decree* in the case; for if there is nothing before the court but a bill, it may be dismissed at any time, and the authority of the trustees left as it was before the bill was filed.<sup>8</sup> Even in the case of a mere bill, the trustees ought to consult the court in important matters, and before incurring large expenses.<sup>9</sup> But even after a decree, which brings all the matters of the trust into the jurisdiction of the court, the trustees must not neglect the duties imposed upon their office; for if they should allow a policy of insurance to expire for want of care, they would be responsible.<sup>10</sup> And they should still collect the personal assets, and prevent them from wasting, and they may give receipts for moneys paid them.<sup>11</sup>

<sup>1</sup> *Guion v. Pickett*, 22 Miss. 77; *Kerr v. Verner*, 66 Penn. St. 326.

<sup>2</sup> *Mitchelson v. Piper*, 8 Sim. 64; *Shewen v. Vanderhorst*, 2 R. & M. 75; 1 R. & M. 347; *Wartman v. Wartman*, Taney, 362.

<sup>3</sup> *Jones v. Powell*, 4 Beav. 96; *Lewin on Trusts*, 425.

<sup>4</sup> *Walker v. Smalwood*, Amb. 676; *Annesley v. Ashurst*, 3 P. Wms. 282.

<sup>5</sup> *Anon.* 10 Ves. 104.

<sup>6</sup> *Widdowson v. Duck*, 3 Mer. 494.

<sup>7</sup> *Mitchelson v. Piper*, 8 Sim. 64; *King v. Roe*, L. J. May, 1858; *Irby v. Irby*, 24 Beav. 525; *Jackson v. Woolly*, 12 Sim. 18.

<sup>8</sup> *Cafe v. Bent*, 3 Hare, 249; *Neeves v. Burrage*, 14 Q. B. 504.

<sup>9</sup> *Att. Gen. v. Clack*, 1 Beav. 467; *Cafe v. Bent*, 3 Hare, 249; *Talbott v. Marshfield*, L. R. 4 Eq. 661.

<sup>10</sup> *Garner v. Moore*, 3 Drew. 277.

<sup>11</sup> *Lewin on Trusts*, 426.

(a) See *Abell v. Abell*, 75 Md. 44.

§ 475. In a court of *law*, the trustee is the absolute owner of the estate, and he can exercise all the powers of ownership; he can sue and be sued,<sup>1</sup> even though the *cestui que trust* is dead,<sup>2</sup> and must act in many respects as the owner; and so he must be treated by others as the sole proprietor; but in equity the *cestui que trust* is the owner, and the question in equity is, how far the trustee can act without exceeding his powers, and rendering himself responsible to the *cestui que trust*. If the trust is a simple or passive one to allow the beneficiary to occupy and enjoy the estate, the trustee has no power or duty to perform, except at the instance of the *cestui que trust*. In trusts of a more particular and active kind, the general power of the trustee is limited to the exact performance of the duty imposed upon him. The duty and power given in such trusts must be strictly performed. There is no room for discretion or divergence from the particular directions contained in the instrument, as where money was left to a trustee to be laid out in lands, he had no discretion to purchase land with a part of the moneys, and to expend the remainder in repairs and improvements.<sup>3</sup>

§ 476. But there are *circumstances* where a trustee *must* exercise the discretionary powers of an absolute owner, otherwise great loss might happen to the estate. The exigencies of the moment may demand immediate action. The *cestui que trust* may be numerous and scattered, or under disability, or not in existence, so that their sanction cannot be obtained, or cannot be obtained without great inconvenience. The alternative of applying to the court may be attended with considerable or disproportionate expense, and perhaps delay,

<sup>1</sup> *Harrison v. Rowan*, 4 Wash. C. C. 202.

<sup>2</sup> *Slevin v. Brown*, 32 Mo. 176.

<sup>3</sup> *Bostock v. Blakeney*, 2 Bro. Ch. 653; *Caldecott v. Brown*, 2 Hare, 145; *Wormley v. Wormley*, 8 Wheat. 421; *Coonrod v. Coonrod*, 6 Ohio, 114; *Locke v. Lomas*, 5 De G. & Sm. 326; *Pinnell v. Hallett*, 2 Ves. 276; *Lewis v. Hill*, 1 Ves. 275; *Supp. Ves. Sr.* 344; *Ringgold v. Ringgold*, 1 Har. & Gil. 11; *Booth v. Purser*, 1 Ired. Eq. 37; *Beatty v. Clark*, 20 Cal. 11.

so that the opportunity is gone and lost forever. It is therefore evident that it is for the interest of the *cestuis que trust* that the trustee should have a reasonable discretionary power to be exercised in emergencies, though no such power is given in the instrument of trust.<sup>1</sup> And so it is a rule of equity that a trustee may safely do that, without a decree of the court, which the court, on a case made, would order or decree him to do.<sup>2</sup> But there is always danger that courts may not view the matter in the same light as the trustee, and so fail to sanction by decree what he has taken the responsibility of doing under a supposed necessity.<sup>3</sup> It is said in some cases, that, if it is doubtful what ought to be done under the circumstances and the terms of the trust, the trustee may give notice to the beneficiary that he intends to act in a certain manner, and unless the *cestui que trust* interferes to prevent it, the court will not hold the trustee responsible if the act turns out disadvantageous.<sup>4</sup> Trustees may waive all matters of mere form which save circuitry, trouble, and expense.<sup>5</sup> Generally a trustee cannot prejudice the *cestui* by his admissions, declarations, or negligence.<sup>6</sup> If, however, he lets the statute of limitations run, the *cestui* is affected.<sup>7</sup>

§ 476 a. As trustees hold the legal title for the benefit of third persons, and as the law forbids them from making any profit to themselves from their management of, or dealing

<sup>1</sup> Ward v. Ward, 2 H. L. Cas. 784, note to Rowley v. Adams ; Angell v. Dawson, 3 Y. & C. Ex. Eq. 317 ; Forshaw v. Higginson, 8 De G., M. & G. 827 ; Darke v. Williamson, 25 Beav. 622 ; Harrison v. Randall, 9 Hare, 407.

<sup>2</sup> Hutton v. Weems, 12 Gill & J. 83 ; Co. Litt. 171 a ; Bath v. Bradford, 2 Ves. 590 ; Hutcheson v. Hammond, 3 Bro. Ch. 145 ; Lee v. Brown, 4 Ves. 369 ; Cook v. Parsons, Pr. Ch. 185 ; Inwood v. Twyne, 2 Eden, 153 ; Terry v. Terry, Gilb. 11 ; Shaw v. Borrer, 1 Keen, 576.

<sup>3</sup> Forshaw v. Higginson, 3 Jur. (N. S.) 476.

<sup>4</sup> Life Association v. Siddal, 3 De G., F. & J. 74.

<sup>5</sup> Pell v. De Winton, 2 De G. & J. 20.

<sup>6</sup> Calwell's Ex'r v. Prindle's Ad., 19 W. Va. 604.

<sup>7</sup> See § 863.

with, the trust fund, so the law protects them from loss if they act according to law in good faith. And in all cases of doubt<sup>1</sup> as to what the law is, and what their conduct ought to be under it, they are entitled to instruction and direction from the court.<sup>2</sup> (a) The advisory jurisdiction will not be exercised in construing a will where the estate devised is a legal one and the questions raised are also purely legal.<sup>3</sup> A trustee should not render a fictitious account in probate in order to settle doubtful rights, but should ask instructions by a suit in equity.<sup>4</sup> Whenever a case occurs which justifies the proceedings, trustees, by a bill setting forth the facts and joining the proper parties, may ask the court for instructions as to their duties under the circumstances in which they, or the trust funds, are placed. Such instructions and orders, obtained without collusion or fraud, and followed in good faith, will protect trustees from loss, whatever may be the event.<sup>5</sup> It would be a harsh rule to hold the trustee for an error of the court.<sup>6</sup>

<sup>1</sup> There must be some doubt or obscurity to entitle a trustee to apply to a court for directions. *In re Brewer*, 43 Hun, 597.

<sup>2</sup> *Wiswell v. First Cong. Church*, 14 Ohio St. 31; *Tillinghast v. Coggs-hall*, 7 R. I. 333; *Att. Gen. v. Moore*, 19 N. J. Eq. 503; *Woodruff v. Cook*, 47 Barb. 304; *Goodhue v. Clark*, 37 N. H. 551; *Crosby v. Mason*, 32 Conn. 482; *Reynolds v. Brandon*, 3 Heisk. 593; *Pet'rs of Baptist Church*, 51 N. H. 424; *Wheeler v. Berry*, 18 N. H. 307; *Talbot v. Radnor*, 3 Myl. & K. 252; *Goodson v. Ellison*, 3 Russ. 583; *Knight v. Martin*, 1 R. & M. 70; *Taml. 237*; *Angier v. Stannard*, 3 Myl. & K. 566; *Curteis v. Candler*, 6 Mod. 123; *Campbell v. Horne*, 1 Y. & C. Ch. 664; *Gardiner v. Downes*, 22 Beav. 397; *Merlin v. Blgrave*, 25 Beav. 137; *Taylor v. Glanville*, 3 Madd. 176; *Loring v. Steineman*, 1 Met. 207; *Grimball v. Cruse*, 70 Ala. 534; *State v. Netherton*, 26 Mo. App. 414; *Little v. Thorne*, 93 N. C. 72.

<sup>3</sup> *Alsbrook v. Reid*, 89 N. C. 151.

<sup>4</sup> *Lincoln v. Aldrich*, 141 Mass. 342

<sup>5</sup> *Loring v. Steineman*, 1 Met. 207; *Tucker v. Horneman*, 4 De G., M.

<sup>6</sup> *Frazer's Ex'rs v. Page*, 82 Ky. 73.

(a) The fact that a beneficiary under a will becomes sole trustee of the estate does not invalidate the trust; but if empowered by the will to sell or mortgage the real estate, his interest is such that he can exercise such power only under the control of the court. *Irving v. Irving*, 47 N. Y. S. 1052; *Losey v. Stanley*, 147 N. Y. 560.

§ 477. A trustee, with power to manage real estate for a person absolutely entitled, but incapable from infancy or otherwise of giving any directions, may make repairs; but he cannot go beyond the necessity of the case, at the peril of having his expenses disallowed.<sup>1</sup> If there is a legal tenant for life and remainder over, the tenant for life cannot commit waste, and must not suffer the buildings to fall into decay;<sup>2</sup> but whatever may be the rights or liabilities of a legal tenant for life, the trustee of an equitable tenant for life cannot interfere with the possession of the equitable tenant for not repairing, unless he is clothed with the special power of managing the life estate.<sup>3</sup> (a) In other respects, the equitable and legal rights of tenants for life and remainder-men, and trustees for tenants for life and remainder-men, are the same. Thus trustees of the life-estate may cut timber for repairs as against the remainder-man, if the tenant for life will consent that income shall be applied for the purpose of using the timber for repairing; for timber cannot be cut to be sold, nor to pay for the labor of repairing.<sup>4</sup> The repairs by a tenant for life are his own act, however beneficial to the

& G. 395; *Rowland v. Morgan*, 13 Jur. 23; *Westcott v. Culliford*, 3 Hare, 274; *Turner v. Frampton*, 2 Coll. 336; *Merlin v. Blagrove*, 25 Beav. 134; *Boreham v. Bignall*, 8 Hare, 134; *Lee v. Delane*, 1 De G. & Sm. 1; and see *post*, § 928.

<sup>1</sup> *Bridge v. Brown*, 2 Y. & C. Ch. 181; *Att. Gen. v. Geary*, 3 Mer. 513; *Sohier v. Eldredge*, 103 Mass. 345; *Kearney v. Kearney*, 3 Green, Ch. 59; *Herbert v. Herbert*, 57 How. (N. Y.) Pr. 333.

<sup>2</sup> *Powys v. Blagrove*, 4 De G., M. & G. 458; *Harnett v. Maitland*, 16 M. & W. 257.

<sup>3</sup> *Powys v. Blagrove*, Kay, 495; 4 De G., M. & G. 458; *Re Skingley*, 3 M. & G. 221; *Gregg v. Coates*, 23 Beav. 33.

<sup>4</sup> Co. Litt. 53 b, 54 b; *Gower v. Eyre*, Coop. 156; *Marlborough v. St. John*, 5 De G. & Sm. 181. When a power to cut timber for necessary repairs is given, the trustees may cut timber on one part of the estates for repairs on another part; and may sell timber, when cut, to pay for timber of the same species, to be applied in repairs, so long as they do not cut more on the whole property than the repairs on the whole property require. *Att. Gen. v. Geary*, 3 Mer. 513.

(a) See *In re Hotchkys*, 32 Ch. 532; *Stanford v. Roberts*, 48 L. J. D. 408; *In re Cartwright*, 41 id. Ch. 50.

remainder-man, and he cannot charge anything upon the inheritance for them;<sup>1</sup> nor will a court direct any improvements to be made.<sup>2</sup> (a) The court said in one case, that there might be an exception to this rule; as where a fund was directed to be laid out in lands, and there was already a settled estate to the same uses, it might be more beneficial to apply part of the fund to prevent buildings on the settled

<sup>1</sup> *Hibbert v. Cooke*, 1 S. & S. 552; *Caldecott v. Brown*, 2 Hare, 144; *Bostock v. Blakeney*, 2 Bro. Ch. 653; *Hamer v. Tilsley*, Johns. 486; *Dent v. Dent*, 30 Beav. 363.

<sup>2</sup> *Nain v. Majoribanks*, 3 Russ. 582.

(a) When real estate devised is out of repair at the time of the testator's death, though it was leased with covenants to repair, yet the tenant for life, not being a party to those covenants, is not bound to fully repair out of the rents and profits; but it is the duty of the trustees to so repair out of the corpus of the estate. *In re Courtier*, 34 Ch. D. 136. See *In re Bennett*, [1896] 1 Ch. 778; *In re De Tabley*, 75 L. T. 328; *Greene v. Greene*, 19 R. I. 619; *Mulrein v. Smillie*, 48 N. Y. S. 994. If, however, the gift to the tenant for life is charged with the "costs, charges, and expenses incurred by" the trustees, ordinary repairs may be payable out of the income. *Re Baring*, [1893] 1 Ch. 61; *Debney v. Eckett*, 71 L. T. 659. In Massachusetts, in the carefully considered case of *Little v. Little*, 161 Mass. 188, it was held that when property is left in trust to pay the income to one class, and the principal eventually to another class, the general rule is that repairs come out of the income and substantial improvements out of capital; and that repairs needed at the

testator's death need not necessarily be classed as improvements. See *Case v. Kelly*, 133 U. S. 21; *Mannix v. Purcell*, 46 Ohio St. 102; *Woodard v. Wright*, 82 Cal. 202; *Odell's Estate*, 4 N. Y. S. 463; *Cole's Estate* (Wis.), 78 N. W. 402. In general, when the repairs amount to a case of salvage or preservation of the inheritance, the court has power, under its original jurisdiction, to sanction the expenditure of part of the trust fund in repairs. See *Conway v. Fenton*, 40 Ch. D. 512; *In re De Teissier's Trust*, [1893] 1 Ch. 153; *Re Baring*, id. 61. Without such authority, a life tenant cannot seriously burden the estate by improvements or extensive repairs. *Moore v. Simonson*, 27 Oregon, 117.

When the trustee under a will is given power to invest in real estate, or to build upon land already belonging to the estate, all parties are bound thereby, whether they are life tenants, remainder-men, or beneficiaries. A life beneficiary under such a trust is a *cestui que trust*, not a life tenant. *Stevens v. Melcher*, 152 N. Y. 551, 566.

estate from going to destruction, than to apply the whole fund to the purchase of new lands;<sup>1</sup> but it would be an extraordinary case which would move the court to create the exception.<sup>2</sup> Where the trust deed requires the trustees to manage the estate according to their "best judgment," it is for them to decide what repairs shall be made, and whether they shall be permanent or temporary. Temporary repairs of trust property are chargeable to the income, and not to the principal.<sup>3</sup> A trust to "receive and pay over rents and profits, beyond necessary expenses" gives power to repair and make valid contracts for that purpose.<sup>4</sup>

§ 478. Superintendents of public works and similar *quasi* trustees may apply the funds under their control in opposing legislation which would operate injuriously to the interests confided to them. Lord Cottenham said that "every trustee is to be allowed the reasonable and proper expenses incurred in protecting the property committed to his care." So they have a right to protect it from indirect and probable injuries;<sup>5</sup> (a) but these *quasi* trustees cannot apply the funds of an existing undertaking for the purpose of obtaining larger powers from the legislature, at least without the consent of all parties interested.<sup>6</sup>

§ 479. An executor is allowed a reasonable time to close up the testator's establishment. In one case a period of two

<sup>1</sup> Caldecott v. Brown, 2 Hare, 145; *Re Barrington's Estate*, 1 John. & H. 142.

<sup>2</sup> Dunne v. Dunne, 3 Sm. & Gif. 22; Dent v. Dent, 30 Beav. 363.

<sup>3</sup> Veazie v. Forsaith, 76 Maine, 173.

<sup>4</sup> Cheatham v. Rowland, 92 N. C. 343.

<sup>5</sup> Bright v. North, 2 Phill. 220; Queen v. Norfolk Comm'rs, 15 Q. B. 549; Att. Gen. v. Andrews, 2 McN. & G. 225; Att. Gen. v. Eastlake, 11 Hare, 205.

<sup>6</sup> Att. Gen. v. Andrews, 2 McN. & G. 225; Vance v. East Lancashire R. Co., 3 K. & J. 50; Att. Gen. v. Guardians of Poor, &c., 17 Sim. 6; Att. Gen. v. Norwich, 16 Sim. 225; Stevens v. South Devon R. Co., 13 Beav. 48.

(a) See Att. Gen. v. Brecon, 10 Ch. D. 204; Reg. v. White, 11 Q. B. D. 309.

months was not considered too long.<sup>1</sup> In most States the time that the testator's family may remain in his house, and use the provisions and other materials on hand, is fixed by statute.

§ 480. An executor or a trustee may appropriate a legacy without suit where the appropriation is such as the court would have directed;<sup>2</sup> and the trustee may expend money for the protection, safety, and support of a *cestui que trust* who is incapable from any cause of taking care of himself, but the better way is to apply to the court.<sup>3</sup>

§ 481. An executor may waive the statute of limitations, by which a debt due from his testator before his death is barred, and if he pays such debt it will be allowed in his accounts.<sup>4</sup> But in most States there are statutes which limit the time of bringing actions against executors and administrators for debts due from the deceased person. In England, there is a decree of administration. After the action is barred against the executor by statute, or by decree of administration, he must plead the statute bar at his peril; and if he should pay after all actions were barred against him by statute, decree of administration, or otherwise, he would pay upon his own responsibility.<sup>5</sup>

<sup>1</sup> Field *v.* Peckett, 29 Beav. 576.

<sup>2</sup> Hutcheson *v.* Hammond, 3 Bro. Ch. 145, 148; Cooper *v.* Douglas, 2 Bro. Ch. 231; Green *v.* Pigot, 1 Bro. Ch. 103; Sitwell *v.* Bernard, 6 Ves. 543; Att. Gen. *v.* Manners, 1 Price, 411; Hill *v.* Atkinson, 2 Mer. 45; Webber *v.* Webber, 1 S. & S. 311; 2 Wms. Ex'rs, pp. 861-864.

<sup>3</sup> Duncombe *v.* Nelson, 9 Beav. 211; Chester *v.* Rolfe, 4 De G., M. & G. 798; *Ex parte* Price, 2 Ves. 407; Williams *v.* Wentworth, 5 Beav. 325; Wentworth *v.* Tubb, 1 Y. & C. Ch. 171; Barnsley *v.* Powell, Amb. 102.

<sup>4</sup> Stahlschmidt *v.* Lett, 1 Sm. & Gif. 415; Hill *v.* Walker, 4 K. & J. 166; Hunter *v.* Baxter, 3 Gif. 214; Dring *v.* Greetham, 1 Eq. R. 442.

<sup>5</sup> Alston *v.* Trollope, L. R. 2 Eq. 205; Dring *v.* Greetham, 1 Eq. R. 442; Fuller *v.* Redman, 26 Beav. 614; Shewen *v.* Vanderhorst, 1 R. & M. 347; 2 R. & M. 75; Briggs *v.* Wilson, 5 De G., M. & G. 12; 2 Eq. R. 153; *Ex parte* Dewdney, 15 Ves. 496; Pool *v.* Dial, 10 S. C. 440; Bacot *v.* Hayward, 5 S. C. 441.



§ 482. A trustee may generally, acting in *good faith*, release or compound a debt due to his trust estate.<sup>1</sup> But if he releases or compromises a debt without sufficient reason or justification, or if he sells a debt for a grossly inadequate consideration, when by proper diligence more could have been realized, he will be answerable for it in his accounts.<sup>2</sup> (a) In many States there are statutes authorizing executors, administrators, guardians, and trustees to refer or compromise all claims due to and from the estates which they represent. Such statutes are constitutional,<sup>3</sup> and courts will ratify and confirm such compromises.<sup>4</sup>

§ 483. Trustees who hold an equity of redemption in lands mortgaged for more than their value may release the equity of redemption to avoid the costs of a foreclosure suit, where such suit will lie, and where costs would be imposed upon them as defendants.<sup>5</sup> If a trustee is a mortgagee, he would not be justified in releasing part of his security for the convenience of the mortgagor merely, nor unless there was some

<sup>1</sup> *Blue v. Marshall*, 3 P. Wms. 381; *Ratcliffe v. Winch*, 17 Beav. 216; *Forshaw v. Higginson*, 8 De G., M. & G. 827.

<sup>2</sup> *Jevon v. Bush*, 1 Vern. 342; *Gorge v. Chansey*, 1 Ch. R. 125; *Wiles v. Gresham*, 5 De G., M. & G. 770; *Re Alexander*, 13 Ir. Ch. 137.

<sup>3</sup> *Clark v. Cordis*, 4 Allen, 466.

<sup>4</sup> *Zambaco v. Cassanetti*, L. R. 11 Eq. 439.

<sup>5</sup> *Lewin on Trusts*, 423 (5th ed.).

(a) See *supra*, § 440; 1 Ames on Trusts (2d ed.), 494, n. A trustee of a naked legal trust cannot, without the assent of the beneficiary, compromise or yield a right already accrued to the trust. *Bizzell v. McKinnon*, 121 N. C. 186.

When a deed of trust is given to secure bonds, the trustee cannot release until the bonds are surrendered for cancellation; it is not sufficient that the bonds were delivered to a third person in escrow for

surrender upon the performance of a condition never performed. *Chicago, &c. Land Co. v. Peck*, 112 Ill. 408. This does not apply when the debtor and creditor agree that the security may be released; and if the trustee becomes the owner of part of the indebtedness so secured, he is not concluded by agreements between the debtor and his co-owner to which he is not a party. *Pearce v. Bryant Coal Co.*, 121 Ill. 590; 25 Ill. App. 51.

advantage to be gained to the *cestui que trust* or the trust estate.<sup>1</sup>

§ 484. Trustees of lands must of course have a general power to lease them, otherwise they could obtain no income; but they must make reasonable leases. In one case a lease for ten years was allowed.<sup>2</sup> (a) Trustees have a general power of leasing, if the lease does not exceed the quantity of estate that is in them, and is a reasonable one. In case of charitable trusts the general rule is that the trustees should lease only for years, but even a perpetual lease will not be set aside in a collateral attack unless clearly unreasonable or detrimental to the beneficiaries; and the lessees who have in good faith made valuable improvements will be protected in equity if the lease is set aside.<sup>3</sup> In the case of farming lands, husbandry leases only can be made: in England, such leases never exceed ten years.<sup>4</sup> Probably there is no such general custom in this country. But if it is a simple trust, and the *cestui que trust* is in possession, the trustee can do nothing without the consent of the beneficiary.

§ 485. A trustee may reimburse himself for money advanced in good faith for the benefit of the *cestui que trust*, or for the protection of the property, or for his own protection in the management of the trust. It is a rule that the *cestui que trust* ought to save the trustee harmless where the trustee has honestly, fairly, and without possibility of gain to himself, paid out money for the benefit of the *cestui que trust*. And a trustee who accepts office at the request of a *cestui que trust* is entitled to be indemnified by the *cestui*

<sup>1</sup> Ibid.

<sup>2</sup> Naylor v. Arnitt, 1 R. & M. 501; Bowes v. East London, &c., Jac. 324; Drohan v. Drohan, 1 B. & B. 185; Middleton v. Dodswell, 13 Ves. 268.

<sup>3</sup> Richmond v. Davis, 103 Ind. 449.

<sup>4</sup> Att. Gen. v. Owen, 10 Ves. 560.

(a) See *In re Shaw's Trusts*, L. R. 12 Eq. 124.

against all loss which may accrue in the proper administration of the trust.<sup>1</sup> (a)

§ 486. The trustees or managers of a trading company or partnership have no power in *any case* to borrow money beyond the capital prescribed in the deed of settlement, and bind the company or its members.<sup>2</sup> (b) And where the trustees borrow money, without special authority conferred by the deed, for launching and enlarging the business, and make themselves personally liable, they have no remedy against the other members of the company.<sup>3</sup> But if the trustees incur expenses and debts, within the scope of their authority, and in the ordinary business of the company, or borrow money to pay for such expenses or debts, the company are in equity liable to pay or contribute to the payment of such debts.<sup>4</sup>

§ 487. A trustee would probably be justified in insuring the property, and in case of loss the insurance money would belong to the *cestui que trust*;<sup>5</sup> but where there is a tenant for life entitled to the income, it would be safer to have such tenant's consent before paying the premium out of his in-

<sup>1</sup> Balch v. Hyham, 2 P. Wms. 453; Jervis v. Wolferstan, 18 L. R. Eq. 18; Snyder's App., 72 Mo. 253.

<sup>2</sup> Burmester v. Norris, 6 Exch. 796; Ricketts v. Bennett, 4 C. B. 688; Hawtayne v. Bourne, 7 M. & W. 595; Hawken v. Bourne, 8 M. & W. 703.

<sup>3</sup> *In re Worcester Corn Exch. Co.*, 3 De G., M. & G. 180; *Ex parte Chippendale*, 4 De G., M. & G. 43; *Australian, &c. Co. v. Mounsey*, 4 K. & J. 733.

<sup>4</sup> *Ibid.*; *Tramp's Case*, 29 Beav. 353; *Hoare's Case*, 30 Beav. 225.

<sup>5</sup> *Lerow v. Wilmarth*, 9 Allen, 382.

(a) This rule does not apply where the maker of the trustee is not a *cestui que trust*; as the trustee voluntarily accepts the trust, he can only incur liability in consequence of his own act in so accepting, and when there is no agreement, express or implied, for indemnity from the maker of the trust, he is to be re-

garded as accepting the trust relying upon the trust funds. *Fraser v. Murdoch*, 6 A. C. 855, 872. See *Hobbs v. Wayet*, 36 Ch. D. 256.

(b) This applies, it seems, only to borrowing money, not to contracting debts. *Yorkshire Ry. Wagon Co. v. Maclure*, 19 Ch. D. 478, 488; 21 id. 309.

come.<sup>1</sup> A mortgagee cannot insure at the expense of the mortgagor without a special stipulation to that effect; and if he insures without such stipulation, he cannot charge the premiums to the mortgagor in his accounts.<sup>2</sup> If a lessor and a lessee insure on their own accounts, neither can claim anything under the policy of the other.<sup>3</sup> So, if a tenant for life insures out of the income, the remainder-man can claim no benefit from the policy. If, however, a common carrier insures property in his hands as a carrier, and there is a loss, he holds the proceeds, after defraying his charges, in trust for the owners of the property, even although such owners might not be able to recover of him for the loss of the property.<sup>4</sup>

§ 488. As there are legal estates and equitable estates, so there are legal powers and equitable powers. Legal powers operate upon the legal estate, and are cognizable in courts of law; equitable powers affect the equitable estate alone, and are exclusively cognizable in courts of equity. Thus, if land is given to A. for life, remainder to B. and his heirs, and a power is given to C. in such manner as to operate under the statutes of uses, the execution of the power conveys the legal estate, and the common law will notice it. But if lands are limited to the use of A. and his heirs, in trust for B. for life, remainder in trust for C. and his heirs, and a power not operating under the statute of uses is given, either to the trustee or the *cestui que trust*, the execution of the power will have no effect at law. It will only convey an equitable or beneficial interest, and can be recognized only in equity.<sup>5</sup>

<sup>1</sup> See *post*, § 553; *Ex parte Andrews*, 2 Rose, 412; *Fry v. Fry*, 27 Beav. 146. If an annuity and a policy on the life of *cestui que vie* are made the subject of a settlement, it is implied that the trustees shall pay the premiums out of the income. *Darcy v. Croft*, 9 Ir. Ch. 19.

<sup>2</sup> *Dobson v. Land*, 8 Hare, 216; *Phillips v. Eastwood*, Llo. & Goo. t. Sugd. 289; *Ex parte Andrews*, 2 Rose, 412.

<sup>3</sup> *Duncombe v. Nelson*, 9 Beav. 211; *Chester v. Rolfe*, 4 De G., M. & G. 798.

<sup>4</sup> *Lauderdale, &c. v. Glyn*, 1 El. & El. 612.

<sup>5</sup> *Lewin on Trusts*, 427.

§ 489. An equitable power, like a legal power, may be appendant to an interest in the estate, and grow out of it, or it may be simply a collateral power given to some person who has no interest whatever in the estate, legal or equitable. Thus a testator gave an estate to his sister and her heirs in trust, to settle it upon such descendants of the donor's mother as she should think fit. The sister married, and it became a question whether she could execute the power under coverture. But Lord Hardwicke held, "that it was a naked equitable power, not coupled with any beneficial interest, and that a *feme covert* can execute such naked power."<sup>1</sup> But where a donor gave a legal estate to trustees in trust for an *infant feme covert* for life, and to permit her by deed or writing to dispose of the estate as she should think fit, and the donor died leaving the *infant feme covert* his heir-at-law, and she, during her infancy and coverture, executed the power, — Lord Hardwicke held this to be bad, as she had the trust in equity for life, and the trust of the inheritance, as the heir-at-law of the donor, therefore the whole equitable inheritance was in her, and this was a power over her own inheritance, and neither infants nor married women can execute a power coupled with an interest.<sup>2</sup>

§ 490. Courts have treated powers as either *strict* or simply *directory*. *Strict* powers are such as are to be executed only under the exact circumstances prescribed in the instrument of trust, and in the exact manner and in favor of the particular class of persons named.<sup>3</sup> *Directory* powers are monitory only, and may be executed with some degree of latitude; as where an advowson was vested in trustees, to present a fit person within *six months* of the incumbent's decease, the direction was held to be monitory, and that the power might be executed after that time had

<sup>1</sup> Godolphin v. Godolphin, 1 Ves. 21; *ante*, § 49.

<sup>2</sup> Hearle v. Greenbank, 1 Ves. 298; Blithe's Case, Freem. 91; Penne v. Peacock, For. 43.

<sup>3</sup> Loring v. Blake, 98 Mass. 253; Hall v. Culver, 34 Conn. 403; Beatty v. Clark, 29 Cal. 11; Boorum v. Wells, 4 Green, Ch. 87.

elapsed.<sup>1</sup> (a) So, when *six* trustees were empowered, when reduced to *three*, to appoint others, and all died but one, this power was held to be simply directory, and that one might fill the vacancies.<sup>2</sup> Where a power was given to sell with all convenient speed, and within *five years* after the testator's decease, these words were held to be directory only, and that a sale and a good title could be made after that time.<sup>3</sup> And when twenty-five trustees were appointed with a direction that when reduced to fifteen the vacancies should be filled, the court held that the trustees were at *liberty* to fill the vacancies when reduced to only seventeen, and that they would be compelled to exercise the power when reduced to fifteen.<sup>4</sup> Again, when powers are coupled with an interest in an estate, a substantial compliance with the directions in executing the powers will be sufficient.<sup>5</sup>

§ 491. Although powers may be given to trustees in the same words which are used in giving them an estate, yet different rules of construction will apply to the gift. Thus, if an estate is given to A. and B. and their heirs, A. and B. may convey it to strangers, and the survivor, where joint-

<sup>1</sup> Att. Gen. v. Scott, 1 Ves. 413; Shalter's App., 43 Penn. St. 83.

<sup>2</sup> Att. Gen. v. Floyer, 2 Vern. 748; Att. Gen. v. Bishop of Litchfield, 5 Ves. 825; Att. Gen. v. Cuming, 2 Y. & C. Ch. 139; Foley v. Wontner, 2 J. & W. 245.

<sup>3</sup> Smith v. Kenney, 33 Tex. 283; Pearce v. Gardner, 10 Hare, 287; Cuff v. Hall, 1 Jur. (N. S.) 973; Shalter's App., 43 Penn. St. 83.

<sup>4</sup> Doe v. Roe, Anst. 86.

<sup>5</sup> Rowe v. Becket, 30 Ind. 154; Rowe v. Lewis, id. 163.

(a) A power of sale is implied when necessary for the division and closing up of the trust estate. Heard v. Read, 169 Mass. 216; Parker v. Seeley, 56 N. J. Eq. 110. A power to pay debts implies a power to lease. Odell's Estate, 4 N. Y. S. 463. Executors who are authorized to receive the rents and income of the residuary estate have an im-

plied power to lease. Corse v. Corse, 144 N. Y. 569, 572. Where a will contained special directions to divide the testator's realty into eight equal parts, it was held that this duty, imposed upon the executors as trustees, carried with it an implied power to sell. Corse v. Chapman, 153 N. Y. 466, 473; Mimms v. Delk, 42 S. C. 195.

tenancy is not abolished, may devise it; but if a power is given to A. and B. and their heirs, it can neither be assigned by both, nor devised by the survivor.<sup>1</sup> Thus, where a *mere naked* power was given to A. and B. and their heirs, Lord Chief-Justice Wilmot said: "It was equivalent to saying, the power is to be executed by consent of both while they live; but when one dies, that consent shall devolve on the heir; the heir of the dead trustee shall consent, as well as the surviving trustee. One may abuse the power. I will supply the loss of one by his heir, and the loss of both by the heirs of both."<sup>2</sup> But where the estate itself is given to A. and B. and their heirs in trust, with certain powers appendant, the power is an essential part of the trust, and passes to the survivor.

§ 492. In one case, a naked power of sale was given to *three trustees and their heirs*, to preserve contingent remainders. The money was to be paid into the hands of the trustees, the survivors or survivor of them, and the executors, administrators, or assigns of such survivor. New trustees were to be appointed as often as one or more of the trustees died. One trustee died, and the Court of Queen's Bench determined that the survivors could not execute the power.<sup>3</sup> Lord Eldon was dissatisfied with the judgment, and said, Did the court "consider that the two surviving trustees and the heir of the deceased trustee were to act together? for it was one thing to say that the survivors should not act until another was appointed, and a different thing to say that the heir of the deceased trustee could act in the meantime."<sup>4</sup> But his Lordship felt himself bound by the authority, and refused to compel a purchaser to take a title under similar circumstances.<sup>5</sup> It will be noticed, that, in this case, the estate itself was not in the trustees; if it had been, the sur-

<sup>1</sup> *Cole v. Wade*, 16 Ves. 46.

<sup>2</sup> *Mansell v. Vaughn*, Wilmot, 50.

<sup>3</sup> *Townsend v. Wilson*, 1 B. & A. 608; 2 Madd. 261; *Cooke v. Crawford*, 13 Sim. 91.

<sup>4</sup> *Hall v. Dewes*, Jac. 193; *Jones v. Price*, 11 Sim. 557.

<sup>5</sup> *Hall v. Dewes*, Jac. 189.

vivors would have had an interest and could have executed the power: for it has been held, that where an estate was devised to three trustees and their respective heirs, upon the trust that they and their respective heirs should sell, the word "respective" was surplusage, and that the survivors could make a title.<sup>1</sup>

§ 493. A power limited to "executors" or "sons-in-law" may be exercised by the survivors, so long as the plural number remains;<sup>2</sup> and if the power is limited to a number of trustees, it may reasonably be concluded, that whether they have any estate or not, *i. e.*, whether the power is an adjunct to the trust, or collateral to it, it may be exercised by the surviving trustees. A power given to "executors" will, if annexed to the office of executor, be continued to the single survivor.<sup>3</sup> So a power given to "trustees" will, as annexed to the estate and office, be exercisable by a single survivor;<sup>4</sup> but it cannot be exercised by one trustee in the lifetime of the other who has not effectually renounced the trust.<sup>5</sup> If a power is communicated to the *trustees* for the time being, it cannot be exercised by a *single* trustee.<sup>6</sup> Where there was a trust for sale, but no sale was to be made without the consent of the testator's sons and daughters, and there were seven sons and daughters, and one died, it was held that a sale with the consent of the survivors was too doubtful a title to be specifically enforced.<sup>7</sup> But where trustees had power to sell, with the consent of a majority of the

<sup>1</sup> Jones *v.* Price, 11 Sim. 557; Hewett *v.* Hewett, 2 Eden, 332; Amb. 208.

<sup>2</sup> 1 Sugd. Pow. 128 (8th ed.).

<sup>3</sup> 1 Sugd. Pow. 128; Howell *v.* Barnes, Cro. Car. 382; Brassey *v.* Chalmers, 4 De G., M. & G. 528, reversing same case in 16 Beav. 231; Colsten *v.* Chandos, 4 Bush, 666.

<sup>4</sup> Lane *v.* Debenham, 11 Hare, 188; Colsten *v.* Chandos, 4 Bush, 666; *Re* Bernstein, 3 Redf. (N. Y.) 20.

<sup>5</sup> Lancashire *v.* Lancashire, 2 Phill. 664; 1 De G. & Sm. 28.

<sup>6</sup> *Ibid.*

<sup>7</sup> Sykes *v.* Sheard, 2 De G., J. & Sm. 6; Alley *v.* Lawrence, 12 Gray, 374.



testator's children then living, and all the children were dead, it was held that the trustees could execute the power by a sale, and make a good title.<sup>1</sup>

§ 494. Where powers are confided to trustees "and their heirs," and not "assigns," it cannot be exercised by persons claiming by assignment under the trustees or their heirs.<sup>2</sup> (a) So it cannot be exercised by a "devisee" of the original trustee, for a devise is an assignment;<sup>3</sup> if the word "assigns" is added to the limitation to the trustees, the devisees can execute such part of the trusts as may be delegated to third persons.<sup>4</sup>

§ 495. When a discretionary legal power is expressly given to A. and his assigns, the assignee or devisee of A., or any one claiming under him by operation of law as heir or executor, may execute the power.<sup>5</sup> As where a power in a mortgage is limited to the mortgagee, his heirs, executors, administrators, and assigns, the power goes along with and is annexed to the security, and the power can be executed

<sup>1</sup> *Leeds v. Wakefield*, 10 Gray, 514; *Williams v. Williams*, 1 Duvall, 221.

<sup>2</sup> *Bradford v. Belfield*, 2 Sim. 264.

<sup>3</sup> *Cooke v. Crawford*, 13 Sim. 91. See *Midland Counties Ry. Co. v. Westcombe*, 11 Sim. 57; *Titley v. Wolstenholme*, 7 Beav. 425; *Mortimer v. Ireland*, 6 Hare, 196; *Ockleston v. Heap*, 1 De G. & Sm. 640; *Beasley v. Wilkinson*, 13 Jur. 649; *Wilson v. Bennett*, 20 L. J. Ch. 279; *Macdonald v. Walker*, 14 Beav. 556; 2 Jarm. on Wills, 716; 1 Greenl. Cruise, 407; *Re Burt's Est.*, 1 Drew. 319.

<sup>4</sup> *Lane v. Debenham*, 11 Hare, 188; *Saloway v. Strawbridge*, 1 K. & J. 371; 7 De G., M. & G. 594.

<sup>5</sup> *How v. Whitfield*, 1 Vent. 338; 1 Freem. 476; *Montague v. Dawes*, 14 Allen, 369.

(a) If real estate is devised to the surviving trustee's devisees. Osbourne to Rowlett, 13 Ch. D. 774; "assigns") in trust for sale, the but see *In re Morton*, 15 id. 143. trust is not personal, but is annexed to the fee taken by the trustees, so that it can be exercised by "Assigns" implies power to assign. *Gizelman v. Starr*, 106 Cal. 661.

by all those to whom any interest in the estate may come, whether heir, executor, administrator, or assignee.<sup>1</sup> When a mortgage is made to A. and B., their heirs and assigns, to secure a joint advance, the power and security are coupled together and go to the survivor, who may execute the power by sale or otherwise.<sup>2</sup> But if an estate is vested in a trustee upon trust, that he, his heirs, executors, administrators, or "assigns," shall sell, &c., the word "assigns" will not authorize the trustee to assign the estate to a stranger;<sup>3</sup> nor, if assigned, can the stranger execute the power.<sup>4</sup>

§ 496. Where the power is matter of personal confidence in the trustee, it cannot be extended beyond the express words and clear intention of the donor; so if a power, indicating personal confidence, is given to a trustee and his *executors*, and the executor of the trustee dies, his executor, or the executor of the executor, who by law in England is executor both of the trustee and his executor, cannot execute the power.<sup>5</sup> Still less could the executor of the executor of the trustee execute such power in this country; for if an executor dies before completing his trust, an executor *de bonis non* must be appointed.

§ 497. A discretionary power to four trustees and the *survivors* of them cannot be executed by the last survivor; for, though the power may generally be held to survive, an intention to the contrary, if it can fairly be inferred, will control. The settlor may be supposed to have said, "I repose confi-

<sup>1</sup> See *ante*, § 199; *Saloway v. Strawbridge*, 1 K. & J. 371; 7 De G., M. & G. 594.

<sup>2</sup> *Hind v. Poole*, 1 K. & J. 383.

<sup>3</sup> *Lewin on Trusts*, 431; *Cooke v. Crawford*, 13 Sim. 98.

<sup>4</sup> *Ibid.*; *Mortimer v. Ireland*, 11 Jur. 721; 6 Hare, 196; *Wilson v. Bennett*, 5 De G. & Sm. 495; *Stevens v. Austen*, 7 Jur. (N. S.) 873; *Burt's Est.*, 1 Drew. 319; *Titley v. Wolstenholme*, 7 Beav. 425; *Ockleston v. Heap*, 1 De G. & Sm. 542; *Ashton v. Wood*, 3 Sm. & Gif. 436; *Hall v. May*, 3 K. & J. 585; *Hardwick v. Mynd*, 1 Anst. 109, is not law.

<sup>5</sup> *Cole v. Wade*, 16 Ves. 44; *Stile v. Thompson*, Dyer, 210 a; Sugd. Pow. 129 (8th ed.).

dence in any two of the trustees jointly, but in neither one of them individually.”<sup>1</sup> But if the power is to four trustees, and the *survivor* of them, it may well be urged that on the death of one, the power may still be exercised by the survivors; for the settlor has said that he reposes confidence in the four jointly, and in each one of them individually.<sup>2</sup>

§ 498. If a power is given to trustees, to be exercised during the *continuance* of the trust, it cannot be exercised after the time when the trust ought to have ceased, though, from the delay of the trustees, it happens that the trust has not in fact been executed.<sup>3</sup> If the powers are not confined to the continuance of the trust, yet they will cease when the objects of the trust have been fully exhausted, and not before.<sup>4</sup> (a) If there is no direction as to the continuance of the trust, the powers will subsist till the end of the trust, although there may be delay by the trustees in making the conveyances directed by the settlor.<sup>5</sup> If the trust continues as to part of the property, but has ceased as to part, the power will remain, and can be exercised over the whole,<sup>6</sup>

<sup>1</sup> Hibbard v. Lamb, Amb. 309; Eaton v. Smith, 2 Beav. 236.

<sup>2</sup> Crewe v. Dicken, 4 Ves. 97.

<sup>3</sup> Wood v. White, 2 Keen, 664; the matter of fact was changed in this case on appeal in 4 Myl. & Cr. 460.

<sup>4</sup> Wolley v. Jenkins, 23 Beav. 53; Mortlock v. Buller, 10 Ves. 315; Wheate v. Hall, 17 Ves. 86; Lantsbery v. Collier, 2 K. & J. 709; McWhorter v. Agnew, 6 Paige, 111; Moore v. Shultz, 13 Penn. St. 101; Salisbury v. Bigelow, 20 Pick. 174; Huckabee v. Billingsby, 16 Ala. 417; Hetzel v. Hetzel, 69 N. Y. 1; Brown v. Meigs, 11 Hun (N. Y.), 203.

<sup>5</sup> Wood v. White, 4 Myl. & Cr. 460; Bolton v. Jacks, 6 Rob. (N. Y.) 166; Cresson v. Ferree, 70 Penn. St. 446.

<sup>6</sup> Trower v. Knightley, 6 Madd. 134; Taite v. Swinstead, 26 Beav. 525.

(a) See *supra*, § 248, notes; Vine v. Raleigh, 24 Ch. D. 238.

A power to sell realty may be exercised after the fee has vested, according to the intention gathered from the instrument creating it. *In re Sudeley*, [1894] 1 Ch. 334. See *Maxwell v. Barringer*, 110 N. C. 76. Such a power usually ends when the trust ends, but if it affirmatively appears that it was the intention of the testator that the trustees should have a power of sale after the trust in other respects has terminated, such power may be exercised after the termination of the trust. *Heard v. Read*, 171 Mass. 374.

unless there is a clear direction to the contrary.<sup>1</sup> As where an estate was vested in trustees, one-half in trust for A. for life, remainder to her children at twenty-one, and the other half in trust for B. for life, remainder to her children at twenty-one, with power to the trustees to sell during the continuance of the trust, and the children of one had arrived at twenty-one, and the trust had determined as to their share, it was held that the trustees had power to sell the whole under the terms of the settlement; it being necessary that the trustees should have the right to sell the whole, in order to preserve the trust for the full benefit of the other half.<sup>2</sup>

§ 499. A power of sale, whether a common-law or equitable power, or taking effect under the statute of uses, can be exercised only by the persons to whom it is expressly given.<sup>3</sup> If a power of sale or any other power is given to two or more persons by name, with no words of survivorship, and one dies, or refuses to act, the others cannot execute the power.<sup>4</sup> (a) But where the power is given to the *trustees as a class*, or to the office of trustee, whether their names are mentioned or not, the power will continue and can be exercised as long as there are more trustees than one, although there are no words of survivorship.<sup>5</sup> In the United States, a power given to executors or trustees, as such, to sell real estate may be exercised so long as a single donee survives; and so, if land is given to trustees to sell, the trustees are joint-tenants, and the survivor will have the freehold, and may exercise the power of sale, it being a power coupled with an interest.<sup>6</sup> And only the acting executors or trustees

<sup>1</sup> Wood v. White, 4 Myl. & Cr. 460.

<sup>2</sup> Trower v. Knightley, 6 Madd. 134; Taite v. Swinstead, 26 Beav. 525; Jefferson v. Tyrer, 9 Jur. 1083; Re Cooke, 4 Ch. D. 454; Re Brown, L. R. 10 Eq. 349.

<sup>3</sup> 1 Sugd. Pow. 141, 144 (6th ed.); Boston Franklinite Co. v. Condit, 4 Green, Ch. 395.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.; Co. Litt. 113 a, n. 2; In Matter of Bull, 45 Barb. 334.

<sup>6</sup> Peter v. Beverley, 10 Pet. 532; 1 How. 134; Shelton v. Homer, 5

· (a) Hadley v. Hadley, 147 Ind. 423, 429.

need join in executing such powers.<sup>1</sup> In many States, statutes have been enacted which authorize the survivor of several executors to execute even naked powers given by will. A grave question has arisen upon these statutes, whether they extend to the execution of discretionary powers given to trustees, or whether they are confined to powers connected with the administrative functions of executors.<sup>2</sup> In general, it would be a question as to the intention of the donor, whether the powers given should be executed by all the trustees named, or any one or more of them; or whether it was the intention that successors or others connected with the trust should have and execute the powers conferred; in

Met. 466; *Treadwell v. Cordis*, 5 Gray, 388; *Gibbs v. Marsh*, 2 Met. 252; *Wells v. Lewis*, 4 Met. (Ky.) 269; *Bonifaut v. Greenfield*, Cro. Eliz. 80; *Franklin v. Osgood*, 2 Johns. Ch. 19; *Zeback v. Smith*, 3 Binn. 69; *Davoue v. Fanning*, 2 Johns. Ch. 254; *Muldrow v. Fox*, 2 Dana, 79; *Hunt v. Rousmaniere*, 2 Mason, 244; *Wood v. Sparks*, 1 Dev. & Bat. 389; *Burr v. Sim*, 1 Whart. 266; *Niles v. Stevens*, 4 Denio, 399; *Coykendall v. Rutherford*, 1 Green, Ch. 360; *Putnam Free School v. Fisher*, 30 Maine, 526; *Jackson v. Burtis*, 14 Johns. 391; *Robertson v. Gaines*, 2 Humph. 367; *Miller v. Meetch*, 8 Barr, 417; *Sharp v. Pratt*, 15 Wend. 610; *Wardwell v. McDowell*, 31 Ill. 364; *Golder v. Bressler*, 105 Ill. 419; *Jackson v. Given*, 16 Johns. 167; *Jackson v. Bates*, 14 id. 391; *Jackson v. Ferris*, 15 id. 391; *Watson v. Pearson*, 2 Exch. 594, n.; *Cadogan v. Ewart*, 7 Ad. & El. 636; *Taylor v. Morris*, 1 Comst. 341; *Tainter v. Clark*, 13 Met. 220; *Warden v. Richards*, 11 Gray, 277; *Gould v. Mather*, 104 Mass. 283; *Parker v. Sears*, 117 Mass. 513; *Collier v. Grimsey*, 36 Ohio St. 17. This matter is regulated in several States by statutes which cannot be cited, but which the reader will consult in his own State. In some States, if one of several trustees has been discharged after acceptance, the court must fill the vacancy before the trustees can execute the power. *Matter of Van Wyck*, 1 Barb. 565.

<sup>1</sup> In *Matter of Bull*, 45 Barb. 334; *Hutchins v. Baldwin*, 7 Bosw. 236.

<sup>2</sup> In Kentucky, South Carolina, and Mississippi, it is held that they do not extend to discretionary powers, but are confined to the functions of the executors in settling up estates. *Woodbridge v. Watkins*, 3 Bibb, 350; *Clay v. Hart*, 7 Dana, 1; *Brown v. Hobson*, 3 A. K. Marsh. 381; *Mallet v. Smith*, 6 Rich. Eq. 22; *Bartlett v. Southerland*, 2 Cush. (Miss.) 401. In New York, the statute was held to apply to powers to be executed by trustees generally. *Taylor v. Morris*, 1 Comst. 341. And see *Chanet v. Villeponteaux*, 3 McCord, 29; *Wood v. Sparks*, 1 Dev. & Bat. 389.

other words, the question is, whether the donor reposed a personal trust and confidence in the trustees appointed, or whether he reposed the power in whomsoever might in fact fill the office of trustee.<sup>1</sup> (a)

<sup>1</sup> *Granville v. McNeile*, 13 Jur. 252; 7 Hare, 156; *Affleck v. James*, 17 Sim. 121; *Shelton v. Homer*, 5 Met. 462; *Ross v. Barclay*, 18 Penn. St. 179; *Pratt v. Rice*, 7 Cush. 209; *Cole v. Wade*, 17 Ves. 27; *Lorings v. Marsh*, 6 Wall. 337; *Fontain v. Ravnell*, 17 How. 369; *Gibbs v. Marsh*, 2 Met. 252. Where the language of the will clearly indicates an intention on the part of the testator to convert realty into personalty, as where the proceeds of the sale are directed to be distributed or applied by the executor or trustee, or the produce of the real estate is blended in a common fund with the personalty in the scheme provided for the settlement of the estate, there is no room for doubt upon this question, and the cases hold that the power to sell is attached to the office, and may be executed by the acting executors or trustees, or by the survivor of them. *Bonifaut v. Greenfield*, Cro. Eliz. 80; *Tylden v. Hyde*, 2 S. & S. 238; *Forbes v. Peacock*, 11 Sim. 152; *Gray v. Henderson*, 71 Penn. St. 368; *Dorland v. Dorland*, 2 Barb. 63; *Sharp v. Pratt*, 15 Wend. 610; *Meakings v. Cromwell*, 2 Sandf. 512; *Putnam Free School v. Fisher*, 30 Maine, 523; *De Saussure v. Lyons*, 16 Rich. 492; *Lockhart v. Northington*, 1 Sneed, 318; *Going v. Emery*, 16 Pick. 111; *Alley v. Lawrence*, 12 Gray, 373; *Warden v. Richards*, 11 Gray, 277; *Terre v. Am. Board*, 53 Vt. 171. To effect a conversion by power of sale, the will or deed must order sale absolutely for all purposes, irrespective of contingencies or discretion. *Anewalt's App.*, 42 Penn. St. 414; *Bleight v. Bank*, 10 id. 131; *Henry v. McCloskey*, 9 Watts, 145; *Wright v. Trustees, &c.*, 1 Hoff. 203; *Dominick v. Michael*, 4 Sandf. 274; *Evans v. Kingsbury*, 2 Randolph, 120. The principle deduced from the decisions seems to be, that a power of sale of the realty, with a direction to distribute the proceeds as personalty, makes an equitable conversion of the realty, and the estate takes the character of personalty from the date of the death of the testator, whether for the payment of debts or legacies, or other purposes of trust declared. And it is said the cases upon this subject seem to depend upon the question whether the testator meant to give the quality to *all intents*, or only so far as respected the particular purposes of the will; for unless the testator has sufficiently declared his intention, not only that realty shall be converted into personalty for the particular purposes of the will, but that the pro-

(a) An executor's general power N. Y. 450; *Pollock v. Hooley*, 67 of sale given by the will is a personal trust under the will, and is not Hun, 370; *Baltimore S. D. Co. v. Sutro*, 75 Md. 361; *Young v. Young*, 97 N. C. 132; *Mordecai v. Schirmer*, 38 S. C. 294.

§ 500. As a general rule, administrators with the will annexed are clothed only with the ordinary duties and powers of administrators, and they can exercise none of the powers given to executors or trustees, in reference to the real estate, unless such powers are specially conferred upon them by the terms of the will.<sup>1</sup> This rule has been altered by statute in several States, but the statutes have been held not to apply to discretionary trusts or personal confidences,<sup>2</sup> but

duce of the real estate shall be taken as personalty whether such purposes take effect or not, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will at the time of the testator's death (whether from the silence or inefficacy of the will or from subsequent lapse) will result to the heir. *Cruse v. Barley*, 3 P. Wms. 21. And in *Ackroyd v. Smith*, 1 Bro. Ch. 503, the Master of the Rolls says: "I used to think that when it is necessary for any purpose of the testator's disposition to convert land into money, the undisposed money would be personalty; but the cases prove the contrary." *Wheldale v. Partridge*, 5 Ves. 388. Where the power of sale is discretionary, no conversion of realty into personalty takes place until a sale is actually made. *Peterson's App.*, 88 Penn. St. 397; *Gest v. Flock*, 1 Green, Ch. 108; *Cook v. Cook*, 20 N. J. Eq. 375. In order to work a conversion, an actual sale, either immediately, or in the future, or upon the happening of some contingency, must be directed in terms or by necessary implication. *Christler v. Meddis*, 6 B. Mon. 35; *Haggard v. Rout*, id. 247. And see Wms. Exrs., 6 Am. Ed. p. 656 *et seq.* and notes, for full statement and citations.

<sup>1</sup> *Tainter v. Clark*, 13 Met. 224; *Moody v. Vandyke*, 4 Binn. 31; *Dunning v. National Bank*, 6 Lans. 296; *Moody v. Fulmer*, 3 Grant, 17; *Waters v. Margerum*, 60 Penn. St. 39, 44; *Drury v. Natick*, 10 Allen, 169; *Evans v. Chew*, 71 Penn. St. 47; *Conklin v. Egerton*, 21 Wend. 430; *Greenough v. Welles*, 10 Cush. 571; *Lucas v. Doe*, 4 Ala. 679; *Hall v. Irwin*, 2 Gilm. 180; *Hunt v. Holden*, 2 Mass. 168; *Knight v. Loomis*, 30 Maine, 208; *Wills v. Cowper*, 2 Ohio, 124; *Jackson v. Potter*, 4 Wend. 672; *Roome v. Phillips*, 27 N. Y. 357; *McDonald v. King*, Cox, 432; *Armstrong v. Park*, 9 Humph. 195; *Drane v. Bayliss*, 1 id. 174; *Ashburn v. Ashburn*, 16 Ga. 213; *Smith v. McConnell*, 17 Ill. 135; *Kidwell v. Brumagim*, 32 Cal. 436; *Brown v. Hobson*, 3 A. K. Marsh. 380; *Vandeman v. Ross*, 36 Tex. 111. In such cases a trustee should be specially appointed to execute the powers which may not be exercised by administrators with the will annexed, and the heirs at law or *cestuis que trust* should be parties to the proceedings. *Roome v. Phillips*, 27 N. Y. 357.

<sup>2</sup> *Comm'rs v. Forney*, 3 Watts & S. 357; *Hester v. Hester*, 2 Ired. Eq. 330; *Smith v. McCrary*, 3 id. 204; *Drayton v. Grimke*, 1 Bail. Eq. 392;

only to the general functions of executors in settling estates.<sup>1</sup> A power of sale in a mortgage given to the mortgagee, his

*Brown v. Armistead*, 6 Rand. 594; *Owens v. Cowan's Heirs*, 7 B. Mon. 156; *Moody v. Fulmer*, 3 Grant, 17.

<sup>1</sup> *Brown v. Hobson*, 3 A. K. Marsh. 381; *Woolridge v. Watkins*, 3 Bibb, 350; *Conklin v. Egerton*, 21 Wend. 430; 25 id. 224; *Montgomery v. Milliken*, 5 Sm. & M. 188; *Tainter v. Clark*, 13 Met. 220; *Ross v. Barclay*, 18 Penn. St. 179; *Bailey v. Brown*, 9 R. I. 79. The cases upon this point are somewhat conflicting, — the result in some cases of different language of the statute, and in others of difference of opinion as to the power of an administrator *cum testamento annexo*. In *Conklin v. Egerton*, *ubi supra*, in an elaborate discussion of the subject, it is held that the power given to the executors to sell the real estate, and divide the proceeds among devisees to whom the estate was given by a previous clause of the will, cannot be executed by an administrator *cum testamento annexo*, notwithstanding the statute enactment that "in all cases where letters of administration *cum testamento annexo* shall be granted, the will of the deceased shall be observed and performed; and the administrators of such shall have the rights and powers, and be subject to the same duties as if they had been named executors in the will." So in *Dominick v. Michael*, 4 Sandf. 274. But the judgment in *Conklin v. Egerton* seems to have been affirmed upon another ground in the Court of Appeals, *Egerton v. Conklin*, 25 Wend. 237; while the doctrine in question was left undetermined, Chancellor Walworth saying that his opinion had been that it was the intention by the statute to substitute the administrator *cum testamento annexo* in the place of the executor as to all trusts of the will, both real and personal, and suggesting that if the doctrine of the court was law, some further legislation was needed, as it would be impossible to carry out the intentions of testators. And in *Roome v. Phillips*, 27 N. Y. 363, the doctrine is acquiesced in, with an intimation that if it had been a new question the result might have been different. And in *Elstner v. Fife*, 32 Ohio St. 371, under statute of that State, it is held that the power of the executors ceased upon their resignation, but an administrator *de bonis non cum testamento annexo* may execute the power. See also, in Virginia, *Brown v. Armistead*, 6 Rand. 594; in North Carolina, *Hester v. Hester*, 2 Ired. Eq. 330; and in Kentucky, *Galley v. Panther*, 7 Bush, 167, and *Dilworth v. Rice*, 48 Mo. 124. And in Pennsylvania, power to sell the residue for the purpose of distributing the proceeds among the beneficiaries passes under the statute to the administrator *de bonis non cum testamento annexo*. *Jackman v. Delafield*, 85 Penn. St. 381; *Cornell v. Green*, 10 Serg. & R. 14; *Allison v. Wilson*, 13 Serg. & R. 330. And a discretionary power of sale for the purpose of distributing the estate as personalty may be exercised by the administrator *cum testamento annexo*, where the executors and trustees renounce the trust. *Wyman*



executors, administrators, or assigns, may be executed by any of the personal representatives of the mortgagee who have the duty of settling his estate.<sup>1</sup> A husband cannot exercise a power given to his wife.<sup>2</sup>

§ 501. If a power of sale is created by a will without stating by whom it is to be exercised, but the proceeds of the *v. Carter*, L. R. 12 Eq. 309. The early cases and some of the later ones, notably the case of *Conklin v. Egerton*, *ubi supra*, and *Tainter v. Clark*, 13 Met. 220, maintain the distinction between the duties of executors *qua* executors for the ordinary purposes of administration, and their duties under powers conferred upon them outside of the ordinary duties of administration; and hold these latter powers to be either a personal confidence in the persons named executors, or powers to them as trustees, which, being in form, when granted to more than one, joint powers, must, by the common law, be exercised jointly, and so could not pass to the survivor; while as to the ordinary duties of executors in the administration of estates, such as might qualify in the office possessed all authority given by the will to the persons named as executors. The statute of 21 Henry VIII. c. 4, seems to have been adopted to enable these powers to be conveniently combined with the duties of executors, and gave to those who should qualify under the will the full power, although others nominated by the will should disclaim; restricting the application of this statute to the cases embraced by it, where some failed to qualify, it would still have been impossible for the survivor of several qualifying executors to exercise such a power. But the courts, carrying out the principle of the statute, held that the powers to convert realty could be exercised by the survivor of several qualifying executors, thus treating the power as a part of the executorship, — “an incident of the administration,” it is called in a recent case, — rather than as a distinct power. *Gould v. Mather*, 104 Mass. 256; *Meakings v. Cromwell*, 1 Seld. 136; *Bogert v. Hestell*, 4 Hill, 492; *Smith v. Claxton*, 4 Madd. 484. In view of these decisions, and of the cases which hold a power of sale by implication in the executors where no person is designated to exercise it, in cases where the proceeds from the sale are directed to be applied by an executor, *post*, § 501, *note*, it seems to follow that where there is an intent shown by the will to convert realty, and to apply or distribute the proceeds by the hand of the executor, the power of sale must be considered a part of the scheme of administration of the estate; and as such, intended by the testator to be exercised by whomsoever should lawfully be charged with the duty of administering, whether he be designated executor or administrator *cum testamento annexo*. *Blake v. Dexter*, 12 Cush. 559.

<sup>1</sup> *Doolittle v. Lewis*, 7 Johns. Ch. 48.

<sup>2</sup> *May's Heirs v. Frazer*, 4 Litt. 391.

sale are directed to be applied or distributed by an executor, trustee, or other person, such executor, trustee, or other person will by implication take the power of selling, unless there is some other intention to be gathered from the whole will.<sup>1</sup> If the will gives a power of sale to pay debts and legacies, or for distribution, without stating by whom the sale is to be made, the executor takes the power by implication.<sup>2</sup> But if there is a power of sale, but no person is named to execute the power, and there is no purpose of the sale but a mere division of the estate, the executors cannot exercise the power; and if they sell and purchase themselves, they cannot be compelled to complete the purchase.<sup>3</sup> A devise to three children in fee, to be divided or sold as two of the three children could agree, conferred no power of sale on any one.<sup>4</sup> And so where an estate was conveyed to a trustee in trust for a corporation, to be conveyed by him under the direction of the directors, and upon his failure to convey, they to appoint other trustees by deed, a deed signed by the president and directors conveyed no estate, though it recited that they were the successors of the trustee.<sup>5</sup> If an estate is given to the executor for life, to be sold at his

<sup>1</sup> *Newton v. Bennett*, 1 Bro. Ch. 135; *Benthan v. Wiltshire*, 4 Madd. 44; *Blatch v. Wilder*, 1 Atk. 420; *Elton v. Harrison*, 2 Swanst. 276, n.; *Tylden v. Hyde*, 2 S. & S. 238; *Forbes v. Peacock*, 11 Sim. 152; *Ward v. Devon*, cited id. 160; *Patton v. Randall*, 1 J. & W. 189; *Curtis v. Fulbrook*, 8 Hare, 28; *Watson v. Pearson*, 2 Exch. 580; *Gosling v. Carter*, 1 Coll. 644; *Doe v. Hughes*, 6 Exch. 223; *Lippincott v. Lippincott*, 4 Green, Ch. 121; *Jones's App.*, 5 Grant, 19.

<sup>2</sup> *Ibid.*; *Bogert v. Hertell*, 4 Hill, 492; *Meakings v. Cromwell*, 2 Sandf. 512; 1 *Selden*, 136; *Dorland v. Dorland*, 2 Barb. 63; *Gray v. Henderson*, 71 Pa. St. 368; and see *Dunning v. National Bank*, 6 Lans. 296; *Davoue v. Fanning*, 2 Johns. Ch. 254; *Houck v. Houck*, 5 Penn. St. 273; *Silverthorn v. McKinster*, 12 id. 67; *Lloyd v. Taylor*, 2 Dallas, 223; *Putnam Free School v. Fisher*, 30 Maine, 523; *Foster v. Craige*, 2 Dev. & B. Eq. 209; *Robertson v. Gaines*, 2 Humph. 378; *Magruder v. Peter*, 11 Gill & J. 217; *Peter v. Beverley*, 10 Peters, 532; 1 *How.* 134; *Lockhart v. Northington*, 1 Sneed, 318.

<sup>3</sup> *Drayton v. Drayton*, 2 Des. 250, n.; *Shoolbred v. Drayton*, id. 246.

<sup>4</sup> *Geroe v. Winter*, 1 Halst. Ch. 655.

<sup>5</sup> *Bumgarner v. Cogswell*, 49 Mo. 259.

death, he can neither sell the land, nor devise the power to *his* executor.<sup>1</sup>

§ 502. If a power is given to several trustees, and one of them refuses to accept, the power may be exercised by the continuing trustee or trustees.<sup>2</sup> Even where the testator desired the remaining trustee to fill the vacancy caused by refusal of the other, and instead of doing so he acts alone, sales and deeds and other acts of such remaining trustee are valid.<sup>3</sup> If the power is not given to the trustees by name, but to the office, and one disclaims, there can be no doubt that the acting trustees can execute the power.<sup>4</sup>

§ 503. A power, though appendant to an estate, is not so appendant that it goes with the estate in every transfer made by the trustee, or in every devolution by course of law.<sup>5</sup> But where the estate is transferred to trustees duly appointed under a power, the transferees take the estate and office together, and can exercise the power. (a) But where the

<sup>1</sup> *Walter v. Logan*, 5 B. Mon. 516. In many of the States, there are statutes which give directions as to who shall exercise powers of sale. And see *Carroll v. Stewart*, 4 Rich. 200.

<sup>2</sup> See *ante*, § 499; *Crewe v. Dicken*, 4 Ves. 97; *Granville v. McNeile*, 7 Hare, 156; *Hawkins v. Kemp*, 3 East, 410; *Cooke v. Crawford*, 13 Sim. 96; *Adams v. Taunton*, 5 Madd. 435; *Bayly v. Cumming*, 10 Ir. Eq. 410; *Sands v. Nugee*, 8 Sim. 130. <sup>3</sup> *Bailey, Pet'r*, 15 R. I. 60.

<sup>4</sup> *Worthington v. Evans*, 1 S. & S. 165; *Boyce v. Corbally*, t. Plunk. 102; *Clarke v. Parker*, 19 Ves. 1; *Welles v. Lewis*, 4 Met. (Ky.) 269; *White v. McDermott*, 1 R. 7 C. L. 1.

<sup>5</sup> *Cole v. Wade*, 16 Ves. 47; *Crewe v. Dicken*, 4 Ves. 97; *Burt's Est.*, 4 Drew. 319; *Wilson v. Bennett*, 5 De G. & Sm. 475; *Hardwick v. Mynd*, Anst. 109, is not law.

(a) The appointee takes under the original deed, except that when the power is a general one, the rule against perpetuities is applied only from the time of executing the power. *Rous v. Jackson*, 29 Ch. D. 521; *In re Devon's Settled Estates*, [1896] 2 Ch. 562, 567. A power of appointing real estate in favor of children may be exercised by an appointment to trustees in trust for sale and to hold the proceeds upon trust for the objects of the power; such trustees will take the legal title to the land as effectively as if it were money, and they are the proper persons to sell. *In re Paget*, [1898] 1 Ch. 290. A power of appointment is not attachable. *Bank v. Morrow*, 99 Tenn. 527.

court appoints new trustees, it cannot communicate arbitrary or discretionary powers to them,<sup>1</sup> unless the instrument of trust confers such powers upon the trustees for the time being, or they are annexed to the office.<sup>2</sup> If a power is given to a trustee, his heirs and assigns, and a new trustee is appointed, and a vesting order made, the new trustee may execute the power under the word "assigns." But statutes in England, and in many of the States, now give new trustees the same power as the old. Under some of these statutes a new trustee may come in and prosecute a suit begun by his predecessors, without recourse to a bill of revivor.<sup>3</sup> A release by one trustee to the others, with an intention of disclaiming, will operate as a formal disclaimer.<sup>4</sup>

§ 504. Though an assignment of the trust estate will not transfer a power to the assignee, neither will the power remain in the assignor; for if the settlor intended the estate and the power to be coupled together, their severance will intercept the execution of the power. As where an estate is given to A. and his heirs in trust, with a power to be executed by A. and his heirs, and A. sells the estate in his lifetime or devises it by his will, the heir of A. cannot execute the power; for the heir is *no* heir as to this estate.<sup>5</sup> But in charities it frequently happens that the estate or fund may vest in one set of donees, and the power of selecting the *cestuis que trust* may exist in another.<sup>6</sup>

<sup>1</sup> *Doyle v. Att. Gen.* 2 Eq. Ca. Ab. 194; *Fordyce v. Bridges*, 2 Phill. 497; *Newman v. Warner*, 1 Sim. (N. S.) 457; *Cole v. Wade*, 16 Ves. 44; *Hibbard v. Lambe*, Amb. 309.

<sup>2</sup> *Bartley v. Bartley*, 3 Drew. 384; *Brassey v. Chalmers*, 4 De G., M. & G. 528; *Byam v. Byam*, 19 Beav. 66; *Bailey v. Brown*, 9 R. I. 79; *Burdick v. Goddard*, 11 R. I. 516.

<sup>3</sup> *Murray v. Dehon*, 102 Mass. 11; Mass. Gen. Stat. Ch. 100, § 9.

<sup>4</sup> *Nicloson v. Wordsworth*, 2 Swanst. 372; *Hussey v. Markham*, Finch. 258; *Sharp v. Sharp*, 2 B. & Ald. 405; *Urch v. Walker*, 3 Myl. & Cr. 702; *Richardson v. Hulbert*, 1 Anst. 65.

<sup>5</sup> *Wilson v. Bennett*, 5 De G. & Sm. 475; *Burt's Est.*, 1 Drew. 319; *Cole v. Wade*, 16 Ves. 27.

<sup>6</sup> *Ex parte Blackburn*, 1 J. & W. 297; *Hibbard v. Lambe*, Amb. 309.

§ 505. The survivorship of the estate carries with it survivorship of such powers as are annexed to the trust.<sup>1</sup> But a mere personal power given to A., B., and C. cannot be exercised by the survivors, if one die. If, however, an *equitable* power is annexed to the trust, and forms an integral part of it, as if an estate is vested in three trustees upon a trust to sell, there, as the power is coupled with an interest, and the interest survives, the power also survives.<sup>2</sup> And this is as old as Lord Coke, who says, "If a man deviseth land to his executors to be sold, and maketh two executors, and one dieth, yet the survivor may sell the land, because as the estate, so the trust shall survive; and so note the diversity between a bare trust and a trust coupled with an interest."<sup>3</sup> At the present day, a trust, that is, a power imperative, whether a bare power or a power coupled with an interest, would equally be carried into execution in courts of equity; for the maxim now is, that "the trust or power imperative is the estate." (a) And it is well settled that, even in trusts reposed in trustees by name, the survivor, *if he takes the estate* with a duty annexed to it, can execute the power; and the rule of survivorship now applies not only to trusts, or powers imperative which are construed as trusts, but also to such discretionary powers as are annexed to the office of trustee, and are intended to form an integral part of it.<sup>4</sup> But powers merely arbitrary and independent of the trust, and not an integral part of it, are governed by the

<sup>1</sup> See *ante*, §§ 499, 502.

<sup>2</sup> *Lane v. Debenham*, 11 Hare, 188; *Peyton v. Bury*, 2 P. Wms. 628; *Eyre v. Shaftesbury*, id. 108; *Mansell v. Vaughn*, Wilm. 49; *Butler v. Bray*, Dyer, 189 b; *Byam v. Byam*, 19 Beav. 58; Co. Litt. 112 b, 113 a; *Flanders v. Clarke*, 1 Ves. 9; *Potter v. Chapman*, Amb. 100; *Jones v. Price*, 11 Sim. 557.

<sup>3</sup> Co. Litt. 113 a, 181 b.

<sup>4</sup> *Lane v. Debenham*, 11 Hare, 188; *Hall v. May*, 3 K. & J. 185; *Warburton v. Sandys*, 14 Sim. 622; *Foley v. Wontner*, 2 J. & W. 246; *Doe v. Godwin*, 1 D. R. 259; *Townsend v. Wilson*, 1 B. & Ald. 608; *Jacob v. Lucas*, 1 Beav. 436.

rules applicable to ordinary powers; as where the trustees by name have power to revoke the limitations, and change the property into a different channel, the discretion is evidently intended to be personal, and not annexed to the estate or office.<sup>1</sup>

§ 506. An unlimited power, to be exercised during successive estates tail, is not invalid for remoteness, for such power may be destroyed with the estate tail.<sup>2</sup> A power, collateral to a limitation in fee, has been supported where it was exercised by sale within the limits prescribed against perpetuities.<sup>3</sup> But how far the execution of such an unlimited power for an indefinite period, and beyond the limits of a perpetuity, could be supported, is not clearly settled.<sup>4</sup> (a) Where a testator devised an estate to trustees in trust for his brother's first and other sons successively in fee, so that the estate and interest of each should go to his next brother on his dying without issue under the age of twenty-one, and if all died without issue under that age, then in trust for the person who should be his next heir, and the trustees had power to sell the estate at their discretion at any time after

<sup>1</sup> *Lane v. Debenham*, 11 Hare, 192; *Hazel v. Hogan*, 47 Mo. 277; *Hazel v. Woods*, id. 298.

<sup>2</sup> *Biddle v. Perkins*, 4 Sim. 135; *Powis v. Capron*, id. 138, n.; *Waring v. Coventry*, 3 Myl. & K. 249; *Wallis v. Freestone*, 10 Sim. 225.

<sup>3</sup> *Boyce v. Hanning*, 2 Cr. & Jer. 334.

<sup>4</sup> 2 Sugd. Pow. 495.

(a) See *supra*, § 503, n. (a). A trust for sale is invalid if not limited to take effect within the period of a life in being and twenty-one years after; but this does not invalidate a trust in the same instrument until the sale is made. *Goodier v. Johnson*, 18 Ch. D. 441; *Goodier v. Edmunds*, [1893] 3 Ch. 455. Discretion given by will to trustees to sell if and when they think fit is treated as inconsistent with an in-

tention that the property should be sold at the testator's death. *In re Pitcairn*, 65 L. J. Ch. 120. Such a power may be exercised even after the death of the tenant for life, if so intended, and if then exercised within a reasonable time, it is not within the rule against perpetuities. *In re Sudeley*, [1894] 1 Ch. 334; see *Cruikshank v. Parker*, 29 Atl. 682; 51 N. J. Eq. 21.

his decease, it was held that a purchaser must take the estate, as the title was good, and the power did not contravene the rule against perpetuities.<sup>1</sup>

§ 507. Some powers are entirely discretionary; that is, it is left entirely to the judgment of the trustees whether they will execute them at all or not; as where the trustees are authorized or directed to do a certain act, or to abstain from it, "if they think fit"<sup>2</sup> or "proper,"<sup>3</sup> or "at their discretion;"<sup>4</sup> or the power may be imperative, and the discretion of the trustees be confined to the time, manner, and place of executing the power, or to the selection of the objects of the trust, as where the trust fund is directed to be applied, paid, or distributed, "when," or "in such manner,"<sup>5</sup> or "in such proportions,"<sup>6</sup> or to such person<sup>7</sup> or persons,<sup>8</sup> within a certain class or otherwise, as the trustees shall determine. So the discretion may be implied, as where the execution of the power calls for judgment and discretion in the trustee, or for his approbation or consent to a settlement, or sale, or marriage;<sup>9</sup> or where he is called upon to decide upon the conduct of a party,<sup>10</sup> or upon the necessity or expediency of any payment or other act;<sup>11</sup> or where he is directed to pay an annuity, "unless circumstances should render it unneces-

<sup>1</sup> *Nelson v. Callow*, 15 Sim. 353; *Cresson v. Ferree*, 70 Penn. St. 446.

<sup>2</sup> *Maddison v. Andrew*, 1 Ves. 53.

<sup>3</sup> *Crossling v. Crossling*, 2 Cox, 396; *Kemp v. Kemp*, 5 Ves. 849; *Longmore v. Broom*, 7 Ves. 124; *Pink v. De Thuissey*, 2 Madd. 157.

<sup>4</sup> *Morice v. Bishop of Durham*, 9 Ves. 399; *Keates v. Burton*, 14 Ves. 434; *Potter v. Chapman*, Amb. 98; *Gibbs v. Rumsey*, 2 V. & B. 294; *Naglee's Est.*, 52 Penn. St. 154.

<sup>5</sup> *Cassidy v. Hynton*, 44 Ohio St. 532.

<sup>6</sup> *Downer v. Downer*, 9 Vt. 231; *Marlborough v. Godolphin*, 2 Ves. 61; *Walsh v. Wallinger*, 2 R. & M. 78.

<sup>7</sup> *Brown v. Higgs*, 4 Ves. 708.

<sup>8</sup> *Grant v. Lyman*, 4 Russ. 292; *Loring v. Blake*, 98 Mass. 253.

<sup>9</sup> *Brereton v. Brereton*, 2 Ves. 87, n.; *Clarke v. Parker*, 19 Ves. 12; *Mortlock v. Buller*, 10 Ves. 314.

<sup>10</sup> *Walker v. Walker*, 5 Madd. 424; *Robinson v. Smith*, 6 id. 194; *Eaton v. Smith*, 2 Beav. 236.

<sup>11</sup> *Gower v. Mainwaring*, 2 Ves. 87.

sary, inexpedient, or impracticable.”<sup>1</sup> All such matters must be mere matters of opinion and discretion.

§ 508. Discretionary powers of trustees are usually divided into four principal classes, as follows: (1) Where it is left to the discretion of the trustees to make or withhold a gift or appointment of the trust property to a specified donee, or *cestui que trust*, or class of donees. In this class, if it is a condition precedent to the gift, legacy, or other interest, that the trustees shall exercise their power in favor of the donee, whether of appointment or assent, no interest will vest in the donee until the power is exercised; and if the trustees refuse to exercise it, the gift cannot be enforced.<sup>2</sup> The court cannot decide upon the propriety or impropriety of the refusal of the trustees to give their assent,<sup>3</sup> unless it proceed from selfish, corrupt, or improper motives; and the burden is upon the donee to prove such motives, and not upon the trustees to show good reasons for their action.<sup>4</sup> The court will, however, always strive to construe this class of powers into trusts, which will give the donee a vested interest, and the trustee only the power of selection, apportionment, and distribution.<sup>5</sup> (2) Where the discretionary power is confined to the selection from, or apportionment to, or distribution among, the objects of the trust. This class of powers is held to create trusts. The beneficial interest is generally vested in the whole class of objects from which the trustees have the power of selection, to be divested out of those who are not selected by the trustees in the exercise of the power;

<sup>1</sup> French v. Davidson, 3 Madd. 396.

<sup>2</sup> Pink v. De Thuissey, 2 Madd. 157; Weller v. Weller, id. 160, n.; French v. Davidson, 3 id. 396; Walker v. Walker, 5 id. 424; Brown v. Higgs, 4 Ves. 719; 5 Ves. 508; 8 Ves. 568; Marlborough v. Godolphin, 2 Ves. 61; Lyman v. Parsons, 26 Conn. 493; 28 Barb. 564, reversing 4 Bradf. 268. See s. c. 20 N. Y. 103; N. Y. Rev. St. part 2, c. 1, tit. 2, art. 3, § 9; Grace v. Phillips, 2 Phill. 701; Leavitt v. Beirne, 21 Conn. 1.

<sup>3</sup> Pink v. De Thuissey, 2 Madd. 162, n.

<sup>4</sup> Clarke v. Parker, 19 Ves. 11; French v. Davidson, 3 Madd. 402.

<sup>5</sup> Wainwright v. Waterman, 1 Ves. Jr. 311; Keates v. Burton, 14 Ves. 434; ante, §§ 248-258; Cochran v. Paris, 11 Grat. 356.



and if the trustees die, or refuse to execute the powers, the whole class takes the property.<sup>1</sup> (3) Where the discretion applies to some ministerial act connected with the estate, such as powers of leasing, selling, appointing new trustees, felling timber, and the like. This class of powers is much more under the control of courts than powers depending upon the exercise of opinion and judgment.<sup>2</sup> The court can enter into all matters in relation to those things that are beneficial to the estate, and into the motives of the trustees for exercising or refusing to exercise these powers; and the courts will not allow the trustees to exercise their powers in this respect in an arbitrary or capricious manner;<sup>3</sup> but if the court has acquired jurisdiction of the case by bill or decree, the trustees must act under the sanction of the court in appointing new trustees, making investments, sales, leases, and in varying the securities,<sup>4</sup> unless the instrument of trust declares that their discretion is to be uncontrolled.<sup>5</sup> And (4) where the discretion to be exercised is a mere matter of personal judgment, as where the consent or approbation of the trustees is required to a marriage, or to the conduct of an individual. The trustees alone can exercise these powers, and courts cannot generally interfere to control these mere personal judgments upon personal matters.<sup>6</sup> But the trus-

<sup>1</sup> *Loring v. Blake*, 98 Mass. 253. The whole matter of powers as trusts is discussed, *ante*, §§ 248-258, and the cases are cited, which see.

<sup>2</sup> *Milsington v. Mulgrave*, 4 Madd. 491; *Hewit v. Hewit*, Amb. 508; *Mortimer v. Watts*, 14 Beav. 616.

<sup>3</sup> *Ibid.*; *Webb v. Shaftesbury*, 7 Ves. 480; *Att. Gen. v. Clack*, 1 Beav. 467; *De Manneville v. Crompton*, 1 V. & B. 359; *Druid Park Heights Co. v. Oettinger*, 53 Md. 63.

<sup>4</sup> *Ibid.*; *Booth v. Booth*, 1 Beav. 125; *Pocock v. Reddington*, 5 Ves. 794; *Parry v. Warrington*, 6 Madd. 155; *Lord v. Godfrey*, 4 id. 459; *Brice v. Stokes*, 11 Ves. 324; *Broadhurst v. Balue*, 1 Younge & C. Ch. 28. And see *Cafe v. Bent*, 3 Hare, 245, and *Hitch v. Leworthy*, 2 Hare, 405.

<sup>5</sup> *Milsington v. Mulgrave*, 3 Madd. 403; *Lee v. Young*, 2 Younge & C. Ch. 536.

<sup>6</sup> *Cole v. Wade*, 16 Ves. 47; *Walker v. Walker*, 5 Madd. 424; *Eaton v. Smith*, 2 Beav. 236; *Cochran v. Paris*, 11 Grat. 356; *French v. Davidson*, 3 Madd. 396; *Brereton v. Brereton*, 2 Ves. 87, n.; *Clarke v. Parker*, 19 Ves. 11; *Weller v. Ker*, 1 Macq. H. L. Sc. Cas. 11.

tees must exercise a reasonable discretion; thus they ought not to pay money into the hands of a lunatic or drunkard to be wasted.<sup>1</sup> If they have power to make advances to set up children in business, they may make advances to a married daughter to set up her husband in business, but not to pay off his debts.<sup>2</sup> And if they have once executed the power by naming a sum to be paid, they cannot reduce it,<sup>3</sup> but in some cases they may make a further advance.<sup>4</sup> And it is always a question for the courts to determine whether the action of the trustees in a given case is within the discretionary powers given them by the instrument of trust.<sup>5</sup>

§ 509. A general power in trustees to vary securities confers upon them power to do all the acts incidental or essential to the performance of that duty; and therefore they may sell and give receipts to purchasers for the purchase-money.<sup>6</sup> This is a power given for the security of the estate and benefit of the trust property;<sup>7</sup> and it ought not to be exercised except when required by necessity or convenience,<sup>8</sup> and upon proper inquiry and circumspection.<sup>9</sup> Therefore trustees ought always to have an immediate and advantageous investment in view before they sell the existing securities.<sup>10</sup> A sale for the mere purpose of converting real estate into personal, or *vice versa*, or without some well-defined and proper purpose in view, would render them responsible for any loss.<sup>11</sup> Each trustee must be satisfied by inquiries of the propriety of the act, and he must not trust to the representa-

<sup>1</sup> *Gott v. Cook*, 7 Paige, 538; *Mason v. Jones*, 2 Barb. S. C. 248.

<sup>2</sup> *Talbot v. Marshfield*, L. R. 4 Eq. 661.

<sup>3</sup> *Mason v. Mason*, 4 Sandf. Ch. 631; *Weller v. Ker*, 1 Macq. H. L. Sc. Cas. 11.

<sup>4</sup> *Webster v. Boddington*, 16 Sim. 177.

<sup>5</sup> *Trustees of Smith v. Northampton*, 10 Allen, 498.

<sup>6</sup> *Wood v. Harman*, 5 Madd. 368. See *ante*, § 466.

<sup>7</sup> *Lord v. Godfrey*, 4 Madd. 459.

<sup>8</sup> *Broadhurst v. Balguy*, 1 Younge & C. Ch. 28.

<sup>9</sup> *Hanbury v. Kirkland*, 3 Sim. 271; *Wormley v. Wormley*, 1 Brock. 330; 8 Wheat. 421.

<sup>10</sup> *Ibid.*; *Watts v. Girdlestone*, 6 Beav. 188.

<sup>11</sup> *Brice v. Stokes*, 11 Ves. 324; *Meyer v. Montriou*, 5 Beav. 146.

tions of his cotrustee.<sup>1</sup> This power is necessarily left in a large degree to the sound discretion of the trustees;<sup>2</sup> and if any check is imposed upon their discretion, as if the consent, or the consent in writing, of the *cestui que trust*, or any other formalities are required before the trustees can act, they must strictly comply with all such requirements.<sup>3</sup> If the trustees have a discretionary power of changing the investments with the consent of the tenant for life, the court cannot compel them to exercise the power at the request of the tenant for life, if they refuse to do so in the *bona fide* exercise of their discretion.<sup>4</sup> But where the power is imperative on the trustees to invest in any particular securities, at the request of the *cestuis que trust*, the court will compel them to exercise the power.<sup>5</sup> But if the power is *imperative*, and there has been a great change of circumstances, as where the *cestuis que trust*, or their connections, to whom the trustees were required to loan the trust fund, have become bankrupt, the court will not compel the trustees to exercise the power.<sup>6</sup> The exercise of the power of varying the securities cannot alter or change the rights of the *cestuis que trust*; on the other hand, the rights of the *cestuis que trust* will be the same whether the trustees invest the fund in real or personal estate.<sup>7</sup> Power to vary the securities is a *usual* power, to be inserted in settlements with the *usual* powers.<sup>8</sup>

§ 510. In early times, courts assumed jurisdiction and control over discretionary powers in trustees, and compelled

<sup>1</sup> *Hanbury v. Kirkland*, 3 Sim. 265; *Broadhurst v. Balguy*, 1 Younge & C. Ch. 16.

<sup>2</sup> *De Manneville v. Crompton*, 1 V. & B. 354.

<sup>3</sup> *Ibid.*; *Cocker v. Quayle*, 1 R. & M. 535; *Greenwood v. Wakeford*, 1 Beav. 579; *Kellaway v. Johnson*, 5 Beav. 319.

<sup>4</sup> *Prendergast v. Prendergast*, 3 H. L. Cas. 195; *Lee v. Young*, 2 Younge & C. Ch. 532.

<sup>5</sup> *Ross v. Goodsall*, 1 N. C. C. 618; *Beauclerk v. Ashburnham*, 8 Beav. 322.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Lord v. Godfrey*, 4 Madd. 455; *Walter v. Maunde*, 19 Ves. 424.

<sup>8</sup> *Sampayo v. Gould*, 12 Sim. 426.

trustees to execute them, or the court itself executed the powers in such manner as it judged most beneficial for the *cestuis que trust*;<sup>1</sup> but this jurisdiction is now repudiated, and courts will not exercise a mere discretionary power, either during the lifetime of the trustees, or after their death or refusal to execute it.<sup>2</sup> But if the power is in the nature of a trust for a class, with a power of selection in the trustees of particular persons of the class, and the trustees die or refuse to make the selection, the courts will still execute the trust for the whole class.<sup>3</sup> In one case a distinction was attempted to be established between a discretion in the trustee to be exercised upon matters of *opinion and judgment*, and a discretion to be exercised upon *matters of fact*; as where the trustees were to exercise certain powers over the estate, if the conduct of one of the beneficiaries was such as to gain their confidence and approval, the court seemed to distinguish between matters of judgment and matters of fact, and directed an inquiry.<sup>4</sup> Lord Hardwicke seemed to give some countenance to this distinction,<sup>5</sup> but the distinction is not established and acted upon; and, in the nature of

<sup>1</sup> *Flanders v. Clarke*, 1 Ves. 10; *Wainwright v. Waterman*, 1 Ves. Jr. 311; *Clarke v. Turner*, 2 Freem. 198; *Gower v. Mainwaring*, 2 Ves. 87, 110; *Hewit v. Hewit*, Amb. 508; *Carr v. Bedford*, 2 Ch. R. 77; *Warburton v. Warburton*, id. 420; 1 Bro. P. C. 34; *Wareham v. Brown*, 2 Vern. 153. Where one is unable to execute the trust given him, the courts will execute it; and where a widow, named coexecutrix of a will which directed that so much of the estate be sold as may be necessary for her support, has been supported on the understanding that the support should be paid out of the property, the party furnishing such support is entitled to be subrogated to the rights of the widow, and to have the court exercise the power in that behalf. *Terve v. Am. Board*, 53 Vt. 171.

<sup>2</sup> *Maddison v. Andrew*, 1 Ves. 60; *Alexander v. Alexander*, 2 Ves. 640; *Kemp v. Kemp*, 5 Ves. Jr. 849; *Keates v. Burton*, 14 Ves. 437; 2 Sugd. Pow. 190; *Gower v. Mainwaring*, 2 Ves. 88; *Brereton v. Brereton*, id. 88, n.; *Potter v. Chapin*, Amb. 98; *Lee v. Young*, 2 Younge & C. Ch. 522; *Caplin's Will*, 11 Jur. (N. S.) 383; *Prendergast v. Prendergast*, 3 H. L. Cas. 195; *Coe's Trust*, 4 K. & J. 199; *Eldredge v. Head*, 106 Mass. 582.

<sup>3</sup> *Ante*, §§ 255-258, and cases cited.

<sup>4</sup> *Walker v. Walker*, 5 Madd. 424.

<sup>5</sup> *Gower v. Mainwaring*, 2 Ves. 87-110.

things, such a distinction cannot be applied to the execution of powers by trustees. It is sufficient to hold them to good faith and fair intentions in the conduct of the trust. It was held, however, in *Holcomb v. Holcomb*, that a discretion entirely beyond the control of courts of equity could not be conferred upon trustees, and that courts could set aside acts done by trustees under a power so unlimited.<sup>1</sup> The discretion of the trustee will not be controlled or questioned so long as he is not guilty of bad faith or abuse of his power and trust; but it is difficult if not impossible to create in the trustee such unbounded power as to preclude a court of equity from controlling him when he acts fraudulently, or palpably abuses his power, as by unreasonably refusing to exercise it, or undertaking to exercise it in an unreasonable manner.<sup>2</sup> As where a discretionary trustee refuses to pay for proper medical attendance upon the *cestui*, the court will interfere.<sup>3</sup> If a trustee having arbitrary power dies and there is no provision for a successor, equity will appoint a new trustee to act under equitable principles in place of the arbitrary discretion.<sup>4</sup>

§ 511. If the trustees exercise their discretionary powers in *good faith* and without fraud or collusion, the court cannot review or control their discretion.<sup>5</sup> Nor will a bill be enter-

<sup>1</sup> *Holcomb v. Holcomb*, 3 Stockt. 281.

<sup>2</sup> *Cromie v. Bull*, 81 Ky. 646.

<sup>3</sup> *Pole v. Pietsch*, 61 Md. 570.

<sup>4</sup> *Weiland v. Townsend*, 33 N. J. Eq. 393.

<sup>5</sup> *Smith v. Wildman*, 37 Conn. 384; *Potter v. Chapman*, Amb. 98; *Cowley v. Hartstonge*, 1 Dow, 378; *Prendergast v. Prendergast*, 3 H. L. Cas. 195; *Att. Gen. v. Moseley*, 12 Jur. 889; 2 De G. & Sm. 398; *Clarke v. Parker*, 19 Ves. 11; *Pink v. De Thuissey*, 2 Madd. 157; *French v. Davidson*, 3 id. 396; *Wood v. Richardson*, 4 Beav. 177; *Morton v. Southgate*, 28 Maine, 41; *Littlefield v. Cole*, 33 Me. 552; *Leavitt v. Beirne*, 21 Conn. 2; *Hawley v. James*, 5 Paige, 485; *Arnold v. Gilbert*, 3 Sandf. Ch. 556; *Mason v. Mason*, 4 id. 623; *Bunner v. Storm*, 1 id. 357; *Gochenauer v. Froelich*, 8 Watts, 19; *Chew v. Chew*, 28 Penn. St. 17; *Cowles v. Brown*, 4 Call, 477; *Cochran v. Paris*, 11 Grat. 356; *Cloud v. Martin*, 1 Dev. & Bat. 397; *Aleyn v. Belchier*, 1 Lead. Cas. Eq. 304. And see *Berry v. Hamilton*, 10 B. Mon. 135; *O'Bannon v. Musselman*, 2 Dev. 523; *El-*

tained to compel the execution of a mere discretionary power.<sup>1</sup> The refusal of a trustee to exercise such a power is no breach of trust for which he can be removed, though he gives no reason for his refusal, and though the execution of the power would appear to be proper and beneficial to the estate.<sup>2</sup> But while the court cannot interfere with a discretion honestly exercised, a party interested in property subject to the discretion of a trustee has a right to institute a bill for a discovery of the property, and also of all the acts of the trustee, and the reasons for the acts, in order that it may be seen whether the discretion of the trustee is honestly exercised or not. And if the administration of the trust is thus rightfully brought within the jurisdiction of the court, the power may be required to be exercised under the eye of the court, though the exercise of it must still remain in the discretion of the trustee, and not in that of the court.<sup>3</sup> And so if the exercise of a discretionary power entirely miscarries, the court may take jurisdiction of the administration of the trust.<sup>4</sup> It has been ruled, however, that the trustees might exercise their discretionary powers, although a bill had been filed for the purpose of having the trusts declared and carried into effect.<sup>5</sup> The trustee cannot, however, exercise his discretion from any fraudulent, selfish, or improper purposes, nor can he refuse to exercise a discretionary power for any such purposes; nor can the power be executed in an illusory or collusive manner.<sup>6</sup> (a) And if he acts, or refuses

*dredge v. Head*, 106 Mass. 582; *Pulpress v. African Church*, 48 Penn. St. 204.

<sup>1</sup> *Brereton v. Brereton*, 2 Ves. 87 n.; *Pink v. De Thuissey*, 2 Madd. 157; *Green v. McBeth*, 12 Rich. Eq. 254.

<sup>2</sup> *Lee v. Young*, 2 Younge & C. Ch. 532; *Matter of Vanderbilt*, 20 Hun (N. Y.), 520.

<sup>3</sup> *Costabadie v. Costabadie*, 6 Hare, 410.

<sup>4</sup> *Feltham v. Turner*, 23 L. T. (N. S.) 345.

<sup>5</sup> *Sillibourne v. Newport*, 1 K. & J. 603.

<sup>6</sup> *Carson v. Carson*, 1 Wins. (N. C.) 24.

(a) The court has power to discretion, and whether it is exercised fairly and honestly. *In re* discretion is an honest and proper *Hodges*, 7 Ch. D. 754, 762; *Tabor*

to act, upon such grounds, the court will interfere and give a remedy to the parties injured by the fraudulent act, or refusal to act, not for the purpose of controlling the discretion of the trustee, but to relieve the parties from the consequences of an improper exercise of the discretion;<sup>1</sup> and if the trustee refuses to exercise his discretion from selfish and interested motives, as where he declines to give his consent to a sale, marriage, or settlement, the court may compel him to assent.<sup>2</sup> In a Kentucky case, where the deed gave the trustee power to sell, on written request of the lady who was the *cestui*, if he deemed it to be for her interest, it was held that he had no right to refuse to sell when he admitted it was necessary, and that the written request had been made. And the court remarked that although the chancellor could not compel a trustee to exercise a naked power, or a power coupled with a trust, if his refusal was a *bona fide* exercise of the discretion placed in him, yet if he perverts the trust or refuses without excuse to exercise the power, the chancellor's authority to compel him to execute his duties is unrestricted.<sup>3</sup>

§ 511 *a*. It is proper further to say, that courts do not favor constructions that confer upon trustees absolute and uncontrollable powers. The donee of the power is not the absolute owner of the property; most frequently he has no beneficial or other interest in it, but simply a power over it for the benefit of third persons.<sup>4</sup> (*a*) The owner of property

<sup>1</sup> *Clarke v. Parker*, 19 Ves. 12; *Peyton v. Bury*, 2 P. Wms. 628; *French v. Davidson*, 3 Madd. 396; *Dashwood v. Bulkeley*, 10 Ves. 245; *D'Aguilar v. Drinkwater*, 2 V. & B. 225; *Kemp v. Kemp*, 5 Ves. 849; *Mesgrett v. Mesgrett*, 2 Vern. 580; 10 Ves. 243; *Topham v. Portland*, L. R. 5 Ch. 40.

<sup>2</sup> *Norcum v. D'Oench*, 2 Bennett, Mo. 98.

<sup>3</sup> *Walker v. Smyser's Ex'rs*, 80 Ky. 620.

<sup>4</sup> *Topham v. Duke of Portland*, 1 De G., J. & S. 568; *Haydel v. Hurck*, 5 Mo. App. 267.

*v. Brooks*, 10 id. 273; *supra*, § 248, exercised. *Whelan v. Palmer*, 39 note. A power of appointment Ch. D. 648.

which is exercised fraudulently and collusively, may still be upheld to the extent that it is beneficially  
(*a*) In New Jersey an absolute power of disposal, annexed to an express devise of a life estate, does

may of course confer upon another an absolute and uncontrollable power over it; but it is the policy of the law to limit irresponsible power as much as possible, and to subject the conduct of every person having the rights and interests of others in his power, to the regulations and control of the rules of law.<sup>1</sup> Wherever the law can control the exercise of a discretionary power, it will do so; as where a trustee had power to expend the principal of an estate for the benefit of a poor woman, "if urgent necessity should require," it was

<sup>1</sup> *Ante*, § 249.

not enlarge the life estate into a fee, either as to real or personal property. *Wooster v. Cooper*, 53 N. J. Eq. 682. *Contra*, under the Alabama statute, see *Hood v. Bramlett*, 105 Ala. 660; see further, 2 Jarman on Wills (Bigelow's 6th Am. ed.), ch. 33. An absolute gift followed by words importing a contingency is not cut down to a life estate in the absence of other circumstances than a gift over on the devisee's death. *In re Bourke*, 27 L. R. Ir. 573.

A devise upon condition that the devisee pay certain legacies given by the will, which does not provide for re-entry or forfeiture, operates as a charge of the legacies upon the land in the devisee's hands, and not as a condition, and the devises are not forfeited by failure to pay such legacies. *Cunningham v. Parker*, 146 N. Y. 29. Where in a will there is an absolute gift followed by a qualification of the mode of its enjoyment to secure certain objects for the legatee's benefit, the absolute gift remains, though the object fails. But if there is an absolute gift followed by a clause diminishing the estate so given to the first taker, the effect is that the absolute gift is cut

down, and it can only be given effect as so diminished. *In re Richards*, 50 L. T. 22. If for any reason the life tenant cannot take, the remaindermen take at once. *Jull v. Jacobs*, 3 Ch. D. 703; *In re Townsend*, 34 Ch. D. 357; *Fox v. Rumery*, 68 Maine, 121. But if there is a gift over upon a condition subsequent, and the failure of the first devise is not by reason of the condition, the estate goes to the heirs of the testator. *M'Carthy v. M'Carthy*, 1 L. R. Ir. 189.

There can be no valid limitation over of personalty left to a person by a will which authorizes him to use, consume, and dispose of the property. *Robertson v. Hardy* (Va.), 23 S. E. Rep. 766. If, however, such a gift made of real and personal estate, is intended for support, the tenant for life is a quasi-trustee of the unconsumed remainder, which he cannot destroy by a gift to a stranger. *Johnson v. Johnson*, 51 Ohio St. 446. See *Griffin v. Griffin*, 141 Ill. 373; *Ladd v. Chase*, 155 Mass. 417; *Birmingham v. Lesan*, 76 Maine, 482; *Wright v. Wright*, 41 N. J. Eq. 382; *Paxton v. Doud* (Ky.), 15 S. W. Rep. 875.



held that the court could compel the execution of the power.<sup>1</sup> So, also, courts can interfere and prevent, by injunction or decree, an abusive, fraudulent, collusive, illusive, or other improper exercise of a discretionary power.<sup>2</sup> To determine what is an abuse of a discretionary power, or what is a fraudulent or improper execution of it, is frequently a matter of great difficulty. In the nature of things, only very general rules can be laid down upon a subject where so much must depend upon the facts of each individual case. Some general propositions have, however, been stated. It has been said, (1) That where a power of electing is given to trustees, as to the rights of third persons, they are bound to exercise such power most beneficially for the *cestuis que trust*.<sup>3</sup> (2) Reference must always be had, in the execution of a power, to the end or purpose intended by the creator of the power, and this end or purpose must be gathered from a construction of the written instrument; and a power must always be executed *bona fide for the end and purpose designed*.<sup>4</sup> (a) (3) A power cannot be executed in favor of the donee of the power, or of his family, unless the instrument specially authorized him so to do.<sup>5</sup> (4) The donee of a power cannot execute it for any pecuniary gain, directly or indirectly, to himself.<sup>6</sup> Nor

<sup>1</sup> Erisman v. Directors of Poor, 47 Penn. St. 509.

<sup>2</sup> *Ante*, § 511; McFarland's App., 37 Penn. St. 205; Pulpress v. African Church, 48 id. 210.

<sup>3</sup> Haynesworth v. Cox, Harp. Eq. R. 149.

<sup>4</sup> Aleyn v. Belchier, 1 Eden, 132; 1 Lead. Cas. in Eq. 304, and cases cited.

<sup>5</sup> *Ante*, § 254, and cases cited.

<sup>6</sup> Lord Sandwich's Case, referred to in McQueen v. Farquhar, 11 Ves. 480, and in Keily v. Keily, 4 Dr. & War. 55; Lady Wellesley v. Earl of Mornington, 2 K. & J. 143; *In re Marsden's Trust*, 4 Drew. 594; Fearon v. Desbrisay, 14 Beav. 635; Beere v. Hoffmister, 23 id. 101; Birley v.

(a) Even the court is not justified in departing from the purpose designed when such departure is not absolutely necessary for the preservation of the trust property; if the maker of the trust directs land producing income to be retained, the court cannot properly direct its sale, though larger income can thus be gained for beneficiaries, who are not under disability. Johns v. Johns, 172 Ill. 472.

(5) can he exercise it for any other purposes personal to himself.<sup>1</sup> A distinction is made between the *motives* which lead to the execution of a power, and *the purpose or end* for which it is executed. Thus, a power may be properly executed according to the true purpose and intent of the creator of the power, but the motives which led the donee to such execution may have been corrupt. On the other hand, a power may have been improperly executed by the donee of the power, induced thereto by motives commendable in themselves, as by filial obedience, or affection.<sup>2</sup> A trust is always to be discharged in the most faithful and conscientious manner, and equity takes care to guard and protect a trustee in the discharge of his duties, while by its strict rules it shields him from temptation so far as possible, by rendering it difficult for him to gain any advantage to himself by his dealings with the trust fund. More especially is this the rule in the exercise, by a trustee, of so many and so great discretionary powers over the rights and interests of persons who are in no position to protect themselves. In the exercise of such powers, the trustee should act with purity of purpose, and

Birley, 25 id. 299; Daubeny v. Cockburn, 1 Mer. 640; Watt v. Creyke, 3 Sm. & Gif. 362; Lee v. Fernie, 1 Beav. 483; Vane v. Dungannon, 2 Sch. & Lef. 118; Horne v. Askham, 12 Beav. 503; Rowley v. Rowley, Kay, 242, 262; Lysaght v. Royse, 2 Sch. & Lef. 151; Lane v. Page, Amb. 233; Butcher v. Johnson, 14 Sim. 444; Wright v. Goff, 22 Beav. 207; Campbell v. Home, 1 Y. & C. Ch. 664; Wheete v. Hall, 17 Ves. 80; Carver v. Bowles, 2 Russ. & My. 301; *Re Beloved Wilkes's Charity*, 3 Mac. & G. 440; 7 Eng. L. & Eq. 85; Henchinbroke v. Seymour, 1 Bro. Ch. 394; Huguenin v. Baseley, 14 Ves. 273; Ring v. Hardwick, 2 Beav. 352; Lasence v. Tierney, 1 Mac. & G. 551; Saunders v. Vautier, 1 Cr. & Phill. 240; Sadler v. Pratt, 5 Sim. 632; Sugd. on Powers, 606 (8th ed.); Agassiz v. Squire, 18 Beav. 431; Farmer v. Martin, 2 Sim. 502; Wallgrave v. Tebbbs, 2 K. & J. 313; Tee v. Ferris, id. 357; Lomax v. Ripley, 3 Sm. & Gif. 48; Stroud v. Norman, Kay, 313; Alexander v. Alexander, id. 242; White v. St. Barbe, 1 Ves. & B. 399; Scroggs v. Scroggs, Amb. 272. And when the purpose becomes unattainable the power ceases. Hetzel v. Hetzel, 69 N. Y. 1; Brown v. Meigs, 11 Hun (N. Y.), 203.

<sup>1</sup> Dummer v. Chippenham, 14 Ves. 245; *Re Beloved Wilkes's Charity*, 3 Mac. & G. 440; 7 Eng. L. & Eq. 85.

<sup>2</sup> Topham v. Portland, L. R. 5 Ch. 57; 1 De G., J. & S. 571.

with a single view to carry out the exact purpose of the power, and the intention of the settlor. If the execution of a power of appointment fails, or if the appointment is set aside as improperly made, the donee may make a new appointment;<sup>1</sup> but if an appointment is set aside by reason of what has taken place between the donee of the power and the appointee, a second appointment by the same donee to the same appointee cannot be sustained otherwise than by clear proof, on the part of the appointee, that the second appointment is perfectly free from the original taint which attached to the first appointment.<sup>2</sup>

<sup>1</sup> *Topham v. Portland*, 11 H. L. Cas. 32; L. R. 5 Ch. 40.

<sup>2</sup> *Topham v. Portland*, L. R. 5 Ch. 60, 61; *Birley v. Birley*, 25 Beav. 299; *Carver v. Richards*, 27 Beav. 488, 1 De G., F. & J. 548.

The great case of *Topham v. Duke of Portland* involved most of the learning upon the subject of appointment under powers. The great question was whether an appointment, which excluded Lady Mary Bentinck from the enjoyment of certain property, was made in accordance with the intent and purpose of the power, or whether the appointment was made under the influence of personal reasons, she having married Colonel Topham contrary to the wishes of her family. It was first heard by Sir John Romilly, Master of the Rolls, and reported 31 Beav. 525. The Master of the Rolls decided that the appointment was void. The duke appealed, and the case was heard by the Lord Justices Turner and Knight Bruce. 1 De G., J. & S. 517. The decree of the Master of the Rolls was affirmed. An appeal was taken to the House of Lords, where the decree was again sustained. 11 H. L. Cas. 32. The Duke of Portland then made a new appointment of the same appointee, and Lady Mary again brought her bill to set aside the second appointment. It was heard before the Vice-Chancellor, Sir William M. James, and the second appointment set aside. See L. R. 5 Ch. 49. An appeal was again taken, which was heard before the Lord Justices, and the decree setting aside the second appointment was sustained. See *Topham v. Portland*, L. R. 5 Ch. 40. Lord Justice Sir George M. Gifford concluded his opinion as follows: "If the object of the appointment in this case had been simply the benefit of the Duke of Portland himself, I am persuaded he would never have come into court. The real object, though morally speaking far different, must, legally speaking, be considered on precisely the same principles as though he sought a benefit for himself; or the object is to bring about a state of things not warranted by the powers. It may be that, on consideration, the Duke of Portland will concur in the opinion

§ 511 b. The execution of a power requires careful consideration. If the manner of its execution is not pointed out, it must be executed in good faith, in the usual manner of doing the business to be done under the power; and there must be a strict adherence, not only to the substance of the power, but also to all the formalities required in its execution by the instrument. These formalities and solemnities are required for the protection of those persons whose rights may be defeated by the exercise of the power, and to prevent the donee of the power from acting with haste and without proper consideration.<sup>1</sup> If a writing is required, a parol disposition would be void, although the property might otherwise be disposed of by parol at law.<sup>2</sup> If it is to be by deed,

that the matter may from henceforth be well left at rest." And it has rested.

In *Library Co. of Philadelphia v. Williams*, 30 Legal Intel. 177 (May 20, 1873), 73 Penn. St. 249, the exercise of a discretionary power by a trustee was much discussed. Dr. Rush gave to his trustee a large amount of property in trust for the Library Company, and gave the trustee power to select a parcel of land, and construct a library building for the company. Dr. Rush afterwards negotiated for the purchase of a lot of land, and procured a pledge or promise from the trustee that he would select that particular lot for the purpose of the library building. Having made the selection, after the death of Dr. Rush, the Library Company brought a bill to correct the execution of the power, on the ground that the trustee had incapacitated himself from exercising the power with a sound judgment and a free discretion, for the reason that he had bound his judgment and discretion by his promise and pledge to the testator. This view of the case was sustained in an able opinion in the court below; but, upon appeal to the Supreme Court of Pennsylvania, the judges, without expressly affirming or disaffirming the law as claimed by the Library Company, found the facts to be, that the trustee was not incapacitated, and that he had made a full and free exercise of his judgment and discretion in the execution of his power, and that the power was properly executed. The court, however, seemed to be of the opinion that the donee of a power might pledge himself to the creator of the power to execute it in a certain manner, and that an execution of the power in pursuance of the pledge might still be good.

<sup>1</sup> *Hawkins v. Kemp*, 3 East, 410; *Rex v. Anstrey*, 6 M. & Sel. 324; *Holmes v. Coghill*, 7 Ves. 506; *Day v. Thwaites*, 3 Ch. Cas. 69, 107; *Ferry v. Laible*, 31 N. J. 566.

<sup>2</sup> *Thurxton v. Att. Gen.*, 1 Vern. 340.

nothing but a deed will execute the power, even though it is to be executed by a married woman; and it must be signed, sealed, acknowledged, delivered, and recorded.<sup>1</sup> If the number of witnesses is named, that number must witness to the instrument that purports to execute the power.<sup>2</sup> If the consent of any third person must be had to the execution, such consent must appear;<sup>3</sup> so if the deed is to be sealed.<sup>4</sup> If it is to be signed, it must be signed by the donee of the power.<sup>5</sup> If notice is to be given of the execution of the power, such notice must be shown,<sup>6</sup> and so of the slightest formality prescribed. If the power is to be executed by deed, it cannot be executed by will.<sup>7</sup> The converse of the proposition is also true, and a power to be executed by a will cannot be executed by a deed, or any instrument to take effect during the lifetime of the donee of the power.<sup>8</sup> Whether the execution of the power is to be by will or deed, or either, depends upon the words of the instrument. If the trustee is "to will it," the power must be executed by will;<sup>9</sup> and so if "after-

<sup>1</sup> Digges's Case, 1 Rep. 73; *Dundas v. Biddle*, 2 Barr. 160.

<sup>2</sup> *Bath v. Montague's Case*, 3 Ch. Cas. 55; 2 Freem. 193; *Kibbett v. Lee*, Hob. 312; Ch. Cas. 90; *Doe v. Keir*, 4 Man. & Ry. 101; *Wright v. Wakeford*, 17 Ves. 459. It was formerly held that the attestation of the witnesses must be noticed in the deed itself. *Wright v. Wakeford*, 17 Ves. 459; *Wright v. Barlow*, 3 Mau. & Sel. 512. But the rule is now relaxed, and it is sufficient that the witnesses in fact attest the writing. *Vincent v. Beshopre*, 5 Exch. 683; *Burdett v. Spilsbury*, 6 Man. & G. 386; *Ladd v. Ladd*, 8 How. 30-40.

<sup>3</sup> *Hawkins v. Kemp*, 3 East, 410; *Mansell v. Mansell*, Wilm. 36.

<sup>4</sup> *Dormer v. Thurland*, 2 P. Wms. 506.

<sup>5</sup> *Bird v. Stride*, Bridg. 21; *Thayer v. Thayer*, Palm. 112; *Blackville v. Ascott*, 2 Eq. Cas. Abr. 654.

<sup>6</sup> *Ward v. Lenthal*, 1 Sid. 143.

<sup>7</sup> *Woodward v. Halsey*, 1 Sugd. on Pow. 255 (3d Am. ed.); *Earl of Darlington v. Putney*, Cowp. 260; *Doe v. Cavan*, 5 T. R. 567; 6 Bro. P. C. Taml. 175; *Bushell v. Bushell*, 1 Rep. t. Redesdale, 96; 4 Taunt. 297; *Follett v. Follett*, 2 P. Wms. 469; *Alley v. Lawrence*, 12 Gray, 373; *Moore v. Demond*, 5 R. I. 130.

<sup>8</sup> *Whaley v. Drummond*, 1 Sugd. on Pow. 257 (3d Am. ed.); *Reid v. Shergold*, 10 Ves. 370; *Anderson v. Dawson*, 15 Ves. 532. But see *Heatly v. Thomas*, 15 Ves. 596.

<sup>9</sup> *Paul v. Heweston*, 2 Myl. & K. 434.

wards to leave it," *i. e.* after the life-estate, but after the death of a tenant for life, *then* "to be at the disposal of A." does not imply a will.<sup>1</sup> If a power is to be executed by a will, all the solemnities of making a will, according to the statutes in force, must be observed, in order that the will may be duly probated;<sup>2</sup> but if the creator of the power point out all the formalities to be used in executing the will, a will executed according to the formalities prescribed in the power will be a valid execution of the power, although the instrument is invalid as a will.<sup>3</sup> (a) The general rule is rigidly adhered to, that powers can be executed only in the mode, and at the time, and upon the conditions prescribed in the instrument creating the power or trust.<sup>4</sup> (b) A

<sup>1</sup> Anon. 3 Lev. 71; *Thomlinson v. Dighton*, 1 Com. 194; 1 P. Wms. 149; *Ex parte Williams*, 1 J. & W. 89; *Doe v. Thorley*, 10 East, 488; *Walsh v. Wallinger*, 2 Russ. & My. 78; Taml. 425; *Brown v. Chambers*, 1 Hayes, 597; *Archibald v. Wright*, 9 Sim. 161.

<sup>2</sup> 1 Sugd. on Pow. 257.

<sup>3</sup> *Eyre v. Fitton*, 1 Sugd. on Pow. 155; *Day v. Thwaites*, 3 Ch. Cas. 69, 92; 2 Vern. 80; *Wilkes v. Holmes*, 9 Mod. 485; 16 Ves. 237, 268; *Goodhill v. Brigham*, 1 Bos. & Pul. 198; *Longford v. Eyre*, 1 P. Wms. 740; *Habergham v. Vincent*, 2 Ves. Jr. 204.

<sup>4</sup> See *ante*, § 254, and *post*, §§ 778, 779, 783-785. If in executing the power something is also stipulated which is not authorized to be done, but which can be clearly distinguished from the rightful execution of the power, the execution so far as authorized is valid, and void for the excess. *Laskey v. Perrysburg Board, &c.*, 35 Ohio St. 519.

(a) A will executing a power is revoked *in toto*, including the exercise of the power, by general words of revocation in a subsequent will. *In re Kingdon*, 32 Ch. D. 604; *Caddell v. Wilcocks*, (1898) P. 21.

(b) A trustee is to do only those acts in the course of administration which are essential to effectuate the purpose of his trust. *Freeman's Estate*, 181 Penn. St. 405. A power to sell and convey land does not include power to mortgage or exchange it, or to license a drain therefrom through the donor's adjoining land.

*Campbell v. Foster Ass'n*, 163 Penn. St. 609; *Atwater v. Perkins*, 51 Conn. 188; *Hampton v. Moorhead*, 62 Iowa, 91; *Butler v. Gazzam*, 81 Ala. 491; *Price v. Courtney*, 87 Mo. 387; *Willis v. Smith*, 66 Texas, 31; *Norris v. Woods*, 89 Va. 873; but see *Kent v. Morrison*, 153 Mass. 137; *In re Bellinger*, [1898] 2 Ch. 534; *Saxby v. Thomas*, 64 L. T. 65; 31 Am. L. Reg. (N. S.) 17. Such a power may be gathered from the whole instrument without express words therefor. *Cherry v. Greene*, 115 Ill. 591. Power to sell, con-

power to sell and to change investments gives no power to pledge some investments in order to raise money to enter upon hazardous enterprises for the possible profit of the trust estate.<sup>1</sup> In Maryland, the intention to execute a power of appointment by will must appear by reference to the power or the subject of it in the will, or from the fact that the will would be inoperative without the aid of the power; but in Massachusetts, a general devise or bequest is construed to

<sup>1</sup> *Loring v. Brodie*, 134 Mass. 453, 466.

ferred by will, is construed liberally to effectuate the intent. *Norris v. Woods*, 89 Va. 873; *Lesser v. Lesser*, 32 N. Y. S. 167; *Ralphs v. Hensler*, 97 Cal. 296. Power to invest or use, so conferred, includes power to sell. *Crawford v. Wearn*, 115 N. C. 540; *Hackett v. Hackett* (N. H.), 40 Atl. 434. But see *In re Holloway*, 60 L. T. 46. A power of attorney to mortgage 'gives' authority to include therein all the usual and appropriate covenants. *Richmond v. Voorhees*, 10 Wash. 316. A power to rent does not include power to sell. *Roe v. Vingut*, 117 N. Y. 204. A power in a trustee to sell trust property to change investments does not enable him to sell to pay debts, or to mortgage or pledge the property. *Loring v. Brodie*, 134 Mass. 453; *Losey v. Stanley*, 147 N. Y. 560, 568; *First Nat. Bank v. National Broadway Bank*, 156 N. Y. 459. Power to trustees to borrow for the payment of liens, and to reimburse from the trust funds afterwards received, does not enable the lien-holders to require payment from insurance collected. *First Nat. Bank v. Michigan Trust Co.*, 105 Mich. 107. Under a testamentary power of sale there is no

right to partition: *Carr*, petitioner, 16 R. I. 645; and *vice versa*: *Heard v. Read*, 171 Mass. 374; nor under such power and a power to reinvest, to make a corporation of the estate and dispose of its shares. *Garesche v. Levering Inv. Co.* (Mo.), 48 S. W. 653. A power to trustees to purchase freehold or leasehold hereditaments does not authorize a purchase of an equity of redemption. *Worman v. Worman*, 61 L. T. 637.

A power given by will is not itself defeated by an act in fraud or excess thereof, but only the fraudulent or excessive act is invalid. *In re Perkins*, [1893] 1 Ch. 283; *Young v. De Putron*, 37 Fed. Rep. 46; *Hillen v. Iselin*, 144 N. Y. 365. A power of sale dependent on a void trust falls with the trust. *Benedict v. Webb*, 98 N. Y. 460; *Dana v. Murray*, 122 N. Y. 604; *Bates v. Bates*, 134 Mass. 110; *Pottle v. Lowe*, 99 Ga. 576; *Penfield v. Tower*, 1 N. Dak. 216.

In general a power of sale is exhausted by a single exercise of the power. *Simmons v. Baynard*, 30 F. R. 532. See *Schanewerk v. Hoberrecht*, 117 Mo. 22; *Taussig v. Reel*, 134 Mo. 530; *Ames v. Holderbaum*, 44 F. R. 224.

include all property of which the testator had the general power of appointment, unless the contrary intent appears by his will, and where the power was created by the will of one domiciled in Massachusetts and in respect to property situated in that State; a will made in Maryland will operate as an execution of the power just as if made here.<sup>1</sup>

§ 511 c. The donee of a power may execute it without expressly referring to it, or taking any notice of it, provided that it is apparent from the whole instrument that it was intended as an execution of the power.<sup>2</sup> The execution of the power, however, must show that it was intended to be such execution; for if it is uncertain whether the act was intended to be an execution of the power, it will not be construed as an execution. The intention to execute a power will sufficiently appear, — (1) When there is some reference to the power in the instrument of execution; (2) where there is a reference to the property which is the subject-matter on which execution of the power is to operate; and (3) where the instrument of execution would have no operation, but would be utterly insensible and absurd, if it was not the execution of a power. Thus, if a donee of a power to sell land have also an interest in his own right in the same land, his deed of the land, making no reference to the power, will convey only his own interest; for there is a subject-matter for the deed to operate upon, excluding the power, and, therefore, as it does not conclusively appear that the deed was intended to be an execution of the power as well as a conveyance of the grantor's interest in the land, it will be held not to be an execution of the power: but if the grantor has no interest in the land, his deed will be insensible and a mere absurdity, if not intended as an execution of the power; therefore, it will be held to be an execution of the power, if it refers to the subject-matter of the power, or describes the land over which his power extends.<sup>3</sup> It will be seen that

<sup>1</sup> *Sewall v. Wilmer*, 132 Mass. 131, 134.

<sup>2</sup> *Gindrat v. Montgomery Gaslight Co.*, 82 Ala. 596, 606.

<sup>3</sup> *Bingham's App.*, 64 Penn. St. 349; *Drusadow v. Wilde*, 63 id. 172;



this last conclusion is a presumption of law; this presumption may be more or less strong, according to all the circumstances of the case and the condition of the property. If all the words of a deed or will can have an effect given to them, and an operation upon property or rights, without being taken as the execution of a power, they will not be an execution of such power.<sup>1</sup> If a man has several powers, and refers to some and not to others, the execution will exclude those not referred to.<sup>2</sup> From these propositions it may be seen why a conveyance of specific property, or a specific devise of property, will generally operate as the execution of a power, if the grantor or testator has no other interest in the property but the power, although he makes no reference to the power in his deed or will.<sup>3</sup> On the other hand, the stu-

*Coryell v. Dunton*, 7 id. 530; *Wetherell v. Wetherell*, 18 id. 265; *Meconkey's App.*, 13 id. 259; *Keefer v. Schwartz*, 47 id. 503; *Allison v. Kurtz*, 2 Watts, 185; *Thompson v. Garwood*, 3 Whart. 287; *Commonwealth v. Duffield*, 2 Jones, 280; *Hefferman v. Addams*, 7 Watts, 116; *Cler's Case*, 6 Rep. 17 b; *Mo.* 476, 577; *Cro. Eliz.* 877; *Cro. Jac.* 31; *Brooke v. Turner*, 2 Bing. N. C. 422; *Wykham v. Wykham*, 18 Ves. 419; *Scrope's Case*, 10 Rep. 143 b; *Frampton v. Frampton*, 6 Rep. 144 b; *Snape v. Turton*, *Cro. Car.* 472; *Deg v. Deg*, 2 P. Wms. 413; *Sel. Cas.* 44; *Fitzgerald v. Fauconberge*, *Fitz.* 107; *Roscommon v. Fowke*, 4 Bro. P. C. 523; *George v. Lansley*, 8 East, 13; *Guy v. Dormer*, *Raym.* 295, 3 Ch. Cas. 91; *Udal v. Udal*, *Al.* 81; *Att. Gen. v. Brackenbury*, 1 Hurl. & Colt. 782; *Baton v. Jacks*, 6 Rob. (N. Y.) 166; *Collins v. Will*, 40 Mo. 28; *Hamilton v. Crosby*, 32 Conn. 342; *White v. Hicks*, 43 Barb. 64; 33 N. Y. 383; *Davis v. Vincent*, 1 Houst. 416; *Parcher v. Daniel*, 12 Rich. Eq. 349; *Myers v. McBride*, 13 Rich. L. 178; *Pease v. Pilot Knob Co.*, 49 Mo. 124; *Blagge v. Miles*, 1 Story, 426; *Amory v. Meredith*, 7 Allen, 397; *Owen v. Switzer*, 5 Mo. 322; *Clark v. Hornthal*, 47 Miss. 434.

<sup>1</sup> *Bingham's Appeal*, 64 Penn. St. 350. A mere quitclaim deed contains no apt words to indicate an intent to sell under a power, and only the beneficial interest of the grantor will pass by deed in that form. *Towle v. Erving*, 23 Wis. 336; *Griswold v. Bigelow*, 6 Conn. 258; *Johnson v. Stanton*, 30 Conn. 297; *Mory v. Mitchell*, 18 Mo. 227.

<sup>2</sup> *Att. Gen. v. Vigor*, 8 Ves. 256; *Maundrell v. Maundrell*, 10 Ves. 246; *Trollope v. Linton*, 1 S. & S. 477; *Bailey v. Lloyd*, 5 Russ. 330; *Pidgely v. Pidgely*, 1 Col. C. C. 255; *Hougham v. Sandys*, 2 Sim. 95; *Roach v. Haynes*, 6 Ves. 153; 8 Ves. 584; *Monk v. Mawdesly*, 1 Sim. 286; *Lawson v. Lawson*, 3 Bro. Ch. 272.

<sup>3</sup> See 1 Sugd. Pow. 356, 383 (3d Am. ed.).

dent will understand why it was so long held that a general conveyance or assignment of all a grantor's property which named no particular property, or a general devise of all a testator's property, without referring to any particular property, and without referring to any power to be executed, did not operate to execute a power the grantor or testator might have.<sup>1</sup> In the one case, a specific reference to the property

<sup>1</sup> 1 Sugd. Pow. 383 *et seq.* (3d Am. ed.); *Doe v. Roake*, 2 Bing. 497; *Blagge v. Miles*, 1 Story, 426; 4 Kent, 336; *Jones v. Tucker*, 2 Mer. 533; *Doe v. Vincent*, 1 Houst. 416, 427; *Hughes v. Turner*, 3 Myl. & K. 688. But the English statutes 7 Will. IV. and 1 Vict. c. 26, § 27, have altered the rule; and at the present day a general devise of real or personal estate operates as an execution of all the power that a testator may have over such property, unless it appears to have been the intention not to execute such power. See *Collard v. Sampson*, 16 Beav. 543; *De G., M. & G.* 224; *Lake v. Currie*, 2 De G., M. & G. 536; *West v. Ray*, 1 Kay, 385; *Orange v. Pickford*, 4 Drew. 363; *Wilson v. Eden*, 16 Beav. 153; *Enniss v. Smith*, 2 De G. & Sm. 722; *Wisden v. Wisden*, 2 Sm. & Gif. 396; *Blagge v. Miles*, 1 Story, 426. The court in Massachusetts has adopted the rule of the English statute. See *Amory v. Meredith*, 7 Allen, 400. (a)

(a) See also *Genet v. Hunt*, 113 N. Y. 158; *In re Johnson*, 19 N. Y. S. 963; *Lee v. Simpson*, 134 U. S. 572; *Naundorf v. Schumann*, 41 N. J. Eq. 14; *Re Marshall*, 138 Penn. St. 260; *Burkett v. Whittemore*, 36 S. C. 428; *Thrasher v. Ballard*, 35 W. Va. 524; *Degman v. Degman* (Ky.), 34 S. W. Rep. 523; *Howell v. Tyler*, 91 N. C. 207; *Johnston v. Knight*, 117 N. C. 122. In Massachusetts, the general rule now is that a general residuary devise operates as an exercise of a power to dispose of property by will, when there is nothing to show that such was not the testator's intention. See *Cumston v. Bartlett*, 149 Mass. 243, 248; *Hassam v. Hazen*, 156 Mass. 93; *Talbot v. Field* (Mass.), 53 N. E. 403.

The above cited St. 1 Vict. c. 26,

§ 27, changed the English law with regard to general powers to appoint "in any manner he may think proper." Under it, a will speaks from the death of the testator, and it executes a power of appointment obtained subsequently to the execution of the will. *Boyes v. Cook*, 14 Ch. D. 53. See *Vaux's Estate*, 11 Phila. 57; *Fry's Estate*, *id.* 305. The words "in any manner" oblige the court to distinguish between writings or deeds and testamentary documents, and a power to appoint by deed, or other writing not a will, is not a power to appoint in any manner so as to be exercisable by a will under § 27 of the English Wills Act. *Phillips v. Cayley*, 43 Ch. D. 222; *In re Tarrant's Trust*, 58 L. J. Ch. 780. That section of the Wills Act refers only to general powers of

indicates an intention to execute a power, if the act can have no other sense, as if the donee of the power has no other interest in the property; but a general devise or conveyance, which neither refers to specific property nor to the power to be executed, indicates no intention to execute a power. It will be understood that there is a wide distinction between executing a special or discretionary power, and a simple devise of the trust estate; for it will be remembered that a trust estate passes under general words in a will to the devisee, but the devisee takes the trust estate subject to the same trusts under which the original trustee held them.<sup>1</sup> It will also be remembered, that there is a difference between a trustee's executing a power of appointment, or otherwise, in his last will, and a *cestui que trust* devising his beneficial interest in a trust estate. It has been considerably discussed, whether general words in the will of a *cestui que trust* devises all his interest in a trust fund, as well as all the estate to which he may have the legal title. It is established by statute in England, that general words in a will shall convey the *cestui que trust's* legal and beneficial estates, and this rule is followed in Massachusetts.<sup>2</sup>

§ 512. A *personal* power is sometimes given to trustees to consent to or approve the marriage of the *cestui que trust*; and the enjoyment of the bounty of the testator by the beneficiaries is sometimes made to depend upon the exercise of this power by trustees. These powers, if exercised in restraint of marriage, are not favored in equity.<sup>3</sup> Therefore, if an interest is *vested* in a beneficiary, subject to be divested

<sup>1</sup> See *ante*, §§ 335-345.

<sup>2</sup> *Amory v. Meredith*, 7 Allen, 397.

<sup>3</sup> *Stackpole v. Beaumont*, 3 Ves. Jr. 89; *Long v. Dennis*, 4 Burr. 2052; *Daley v. Desbouverie*, 2 Atk. 261.

appointments and does not apply to limited or special powers. *Doyle v. Coyle*, [1895] 1 Ir. R. 205.

Only the will can be looked at in determining whether a testator has shown an intention not to exercise by a residuary gift a general power of appointment reserved to him by a settlement. *In re Marsh*, 38 Ch. D. 630.

in case the beneficiary marries without the consent or approbation of the trustee, and there is *no gift over* to take effect upon the marriage without such consent, the power or condition will be treated as void, and will not be enforced.<sup>1</sup> But this rule will not apply to a charge on real estate.<sup>2</sup> If the condition is *subsequent*, and the interest is given over on the failure of the donee to comply with it, the court will enforce the gift over if the first donee marry without the consent of the trustees.<sup>3</sup> (a) It is said to be doubtful, whether a general gift of the residue will be a sufficient gift over to give validity to such power;<sup>4</sup> but if the direction is, that the particular gift shall fall into the residue, in case the donee marries without the consent of the trustees, it is a good gift over.<sup>5</sup>

§ 513. If the property once vests absolutely in the donee, and there is a general and unlimited condition that he shall not marry without the consent of the trustees, the necessity of the consent ceases as soon as the interest vests; as where a legacy is given to a child at twenty-one, provided, if he marry without the consent of the trustees, he should forfeit it. The legacy vests at twenty-one, and if he marry afterwards without consent, the condition, being subsequent, is gone, and there is no forfeiture;<sup>6</sup> and where a child marries

<sup>1</sup> *Semphill v. Hayley*, Pr. Ch. 562; *Garrett v. Pritty*, 2 Vern. 293; 3 Mer. 120; *Jervoise v. Duke*, 1 Vern. 20; *Harvey v. Aston*, 1 Atk. 378; *Wheeler v. Bingham*, 3 Atk. 364; *Lloyd v. Branton*, 3 Mer. 117; 1 Rop. Leg. 715; *W. v. B.*, 11 Beav. 621; *Poole v. Bate*, 11 Hare, 33; *Marples v. Bainbridge*, 1 Madd. 590; *McIlvaine v. Gether*, 3 Whart. 575; *Hooper v. Dundas*, 10 Barr, 75; *Maddox v. Maddox*, 11 Grat. 804.

<sup>2</sup> *Ibid.*; *Reynish v. Martin*, 3 Atk. 333; *Berkely v. Ryder*, 2 Ves. 535.

<sup>3</sup> *Ibid.*; *Stratton v. Grimes*, 2 Vern. 357; *Dashwood v. Bulkeley*, 10 Ves. 230; *Scott v. Tyler*, 2 Bro. Ch. 431; 2 Lead. Cas. Eq. 105, and notes.

<sup>4</sup> *Harvey v. Aston*, 1 Atk. 375; *contra*, *Wheeler v. Bingham*, 3 Atk. 364; *Lloyd v. Branton*, 3 Mer. 118; *Scott v. Tyler*, 2 Lead. Cas. Eq. 396.

<sup>5</sup> *Wheeler v. Bingham*, 3 Atk. 368; *Lloyd v. Branton*, 3 Mer. 118.

<sup>6</sup> *Pullen v. Ready*, 2 Atk. 587; *Desbody v. Boyville*, 2 P. Wms. 547;

(a) See *In re Moore*, 39 Ch. D. 116, 123, 131.

in the testator's lifetime, with his consent, but after the date of the will, such conditions, as to consent of trustees, are of no effect; and they do not apply to a second marriage.<sup>1</sup>

§ 514. Where power is given to a trustee to consent to a marriage, as a condition precedent to the gift's taking effect, nothing will vest in the donee until the condition is complied with; as where there is a gift in trust for a party *upon his marriage*, or *upon his marriage with the proper consent of the trustee*, the gift will not vest in the beneficiary until his marriage with the consent of the trustee.<sup>2</sup> Under such form of gift, it is immaterial whether there is a gift over or not.<sup>3</sup> The rule will apply, whether the consent to the marriage is required until a certain age, or during the whole life.<sup>4</sup> Where there was a gift in trust to a party, if he should marry with the consent of the trustees, and *over*, if he should marry *against* their consent, it was held, that *against* was

Knapp v. Noyes, Amb. 662; Osborn v. Brown, 5 Ves. 527; Stackpole v. Beaumont, 3 Ves. Jr. 89; Malcolm v. O'Callaghan, 2 Madd. 351; Lloyd v. Branton, 3 Mer. 108; Graydon v. Hicks, 2 Atk. 18; Garrett v. Pretty, 2 Vern. 293; 3 Mer. 120, n.

<sup>1</sup> Clarke v. Berkely, 2 Vern. 720; Crommelin v. Crommelin, 3 Ves. Jr. 227; Parnell v. Lyon, 1 V. & B. 479; Wheeler v. Warner, 1 S. & S. 304; Smith v. Cowdery, 2 S. & S. 358; Coventry v. Higgins, 8 Jur. 182.

<sup>2</sup> Reeves v. Herne, 5 Vin. Abr. 343, pl. 41; Reynish v. Martin, 3 Atk. 330; Frye v. Porter, 1 Ch. Cas. 138; 1 Mod. 300; Bertie v. Falkland, 3 Ch. Cas. 129; Holmes v. Lysight, 2 Bro. P. C. 261; Hemmings v. Munckley, 1 Bro. Ch. 303; Scott v. Tyler, 2 Bro. Ch. 489; 2 Lead. Cas. Eq. 105, notes; 2 Dick. 712; Knight v. Cameron, 14 Ves. 289; Creagh v. Wilson, 2 Vern. 572; Gillett v. Wray, 1 P. Wms. 284; Harvey v. Aston, 1 Atk. 375; Newton v. Marsden, 2 John. & H. 356; Hotz's Est., 38 Penn. St. 422; Cornell v. Lovett, 35 id. 100; Taylor v. Mason, 9 Wheat. 350; Collier v. Slaughter, 2 Ala. 263; Stratton v. Grymes, 2 Vern. 357; Barton v. Barton, id. 308; Hawkins v. Skeggs, 10 Humph. 31; Bennett v. Robinson, 10 Watts, 348; Com'th v. Stauffer, 10 Penn. St. 350; McCullough's App., 2 Jones, 197; Phillips v. Medbury, 7 Conn. 568.

<sup>3</sup> Ibid.; Clarke v. Parker, 19 Ves. 8; Malcolm v. O'Callaghan, 2 Madd. 349; Long v. Ricketts, 2 S. & S. 179; Stackpole v. Beaumont, 3 Ves. Jr. 89; 1 Rep. Leg. 658.

<sup>4</sup> Ibid.; Lloyd v. Branton, 3 Mer. 108.

equivalent to *without*, and that the gift went over, although it did not appear that the trustees opposed the marriage.<sup>1</sup> The trustees' powers are exhausted by consent to one marriage; if, therefore, they consent to one marriage, the beneficiary may marry a second time without their consent.<sup>2</sup> But the rule in relation to a first marriage without consent, and a second marriage with consent, is uncertain.<sup>3</sup>

§ 515. A general restraint of marriage, with or without the consent of trustees, or with any person, is illegal and void, as contrary to the policy of the law. Therefore, a gift, in trust, upon the condition that the beneficiary shall not marry at all, will vest in the donee, and the condition is void.<sup>4</sup> So all conditions, leading to a probable prohibition of marriage, are void.<sup>5</sup> But a condition, restraining marriage under the age of twenty-one, or before a reasonable age without consent, is valid.<sup>6</sup> So conditions that restrain marriage with a particular person, or with natives of a particular country, or of a particular religion, or conditions that prescribe the ceremonies of the marriage, are valid, and may be enforced in relation to the property.<sup>7</sup>

<sup>1</sup> Long v. Ricketts, 2 S. & S. 179; and see Harvey v. Aston, 1 Atk. 375; Pollock v. Croft, 1 Mer. 184.

<sup>2</sup> Hutcheson v. Hammond, 3 Bro. Ch. 128; Crommelin v. Crommelin, 3 Ves. Jr. 227; Low v. Manners, 5 B. & Ald. 967; 1 Rep. Leg. 709.

<sup>3</sup> Malcolm v. O'Callaghan, 2 Madd. 349.

<sup>4</sup> Waters v. Tazewell, 9 Ind. 291; Maddox v. Maddox, 11 Grat. 804; Keily v. Monck, 3 Ridgw. P. C. 205, 244, 249, 261; Harvey v. Aston, Comyn, 726; 1 Atk. 361; 1 Eq. Cas. Ab. 110, pl. 2, n. (a); Rishton v. Cobb, 9 Sim. 615; Morley v. Rennoldson, 2 Hare, 570; Connelly v. Connelly, 7 Moore, P. C. 438.

<sup>5</sup> Ibid.; Long v. Dennis, 4 Burr. 2052.

<sup>6</sup> Sutton v. Jewke, 2 Ch. R. 9; Creagh v. Wilson, 2 Vern. 573; Ashton v. Ashton, Pr. Ch. 226; Chauncy v. Graydon, 2 Atk. 616; Hemmings v. Munckley, 1 Bro. Ch. 304; Dashwood v. Bulkely, 10 Ves. 230; Stackpole v. Beaumont, 3 Ves. Jr. 96; Pearce v. Loman, 3 Ves. 139; Yonge v. Furze, 3 Jur. (N. S.) 603.

<sup>7</sup> Jervois v. Duke, 1 Vern. 19; Randall v. Payne, 1 Bro. Ch. 55; Perrin v. Lyon, 9 East, 170; Duggan v. Kelly, 10 Ir. Eq. 295; 1 Eq. Cas. Ab. 110, pl. 2, n. (a); Haughton v. Haughton, 1 Moll. 611.

§ 516. Where there is a limitation of property to a person until marriage, and, upon marriage *over* to some other person, or during widowhood, or while single, or where there is an annuity, payable to a person until such time, or during such time, and then to cease, the limitation is valid. Such a gift is upon no condition at all, but is a clear limitation, that marks the duration and continuance of the interest.<sup>1</sup> But where a testator devised lands to trustees in trust for B. for life, provided she does not marry, and, after her decease or marriage, over to other persons, and the testator afterwards married B. himself, and republished his will, with the same proviso in it, it was held that B. was entitled to the property notwithstanding her marriage.<sup>2</sup>

§ 517. Where such powers of consent are given to trustees, the marriage of the *cestui que trust*, during the testator's lifetime with his consent or subsequent approval, renders them inapplicable, and they cannot be executed.<sup>3</sup> The assent of the trustees, when necessary, may be implied, as where they allow a courtship and marriage to take place, and make no objection.<sup>4</sup> In this case no particular form of consent was prescribed. Even where a written consent was prescribed, and the trustees negotiated the settlement and the marriage,

<sup>1</sup> *Jordan v. Holkam*, Amb. 209; *Barton v. Barton*, 2 Vern. 308; *Scott v. Tyler*, 2 Lead. Cas. Eq. 396; *Lowe v. Peers*, Wilm. 369; *Bird v. Hunsdon*, 2 Swanst. 342; *Marples v. Bainbridge*, 1 Madd. 590; *Webb v. Grace*, 2 Phill. 701, reversing 15 Sim. 384; *Richards v. Baker*, 2 Atk. 321; *Sheffield v. Orrery*, 3 Atk. 282; *Gordon v. Adolphus*, 3 Bro. P. C. 306; *Heath v. Lewis*, 3 De G., M. & G. 954. The early case of *Parsons v. Winslow*, 6 Mass. 169, is not in accordance with the authorities, nor can it be sustained on principle.

<sup>2</sup> *Cooper v. Cooper*, 6 Ir. Ch. 217; *Corkers v. Minons*, 1 Ir. Jur. 316; *West v. Kerr*, 6 id. 141.

<sup>3</sup> *Clarke v. Berkely*, 2 Vern. 720; *Coffin v. Cooper*, cited 1 Ves. & B. 481; *Parnell v. Lyon*, id. 479; *Wheeler v. Warner*, 1 S. & S. 374; *Coventry v. Higgins*, 14 Sim. 30; *Crommelin v. Crommelin*, 3 Ves. Jr. 227; *Smith v. Cowdery*, 2 S. & S. 358.

<sup>4</sup> *Mesgreth v. Mesgreth*, 2 Vern. 580; *Clarke v. Parker*, 19 Ves. 12; *Harvey v. Aston*, 1 Atk. 375; *O'Callaghan v. Cooper*, 5 Ves. 126.

it was held sufficient:<sup>1</sup> they should be estopped to deny their consent to a marriage of their own procurement. There need be no consent to a particular marriage, if the *cestui que trust* has a general consent or license to marry whom she chooses.<sup>2</sup> If the consent is required to be in writing, very loose and general expressions of consent in letters, if acted upon, will be construed into assent.<sup>3</sup> (a) If the consent is required to be in writing, any fraud or procurement, on the part of the trustees, will estop them from insisting upon the forfeiture;<sup>4</sup> but if there is no collusive conduct, and consent is required to be in writing, an implied or verbal consent cannot satisfy the condition.<sup>5</sup> A deed is not necessary, unless specially required by the will.<sup>6</sup> The consent must be given previously to the marriage, and the approbation of the trustees afterwards is immaterial, because no subsequent approbation could be a performance of the condition, or avoid a forfeiture for a breach of it.<sup>7</sup> If the time is stated for the exercise of the power, the consent cannot be three years before the time named.<sup>8</sup> (b) If, however, the trustees gave their consent to the marriage at the proper time, but were prevented by accident from executing the formal writings

<sup>1</sup> *Strange v. Smith*, Amb. 263; *Worthington v. Evans*, 1 S. & S. 165.

<sup>2</sup> *Mercer v. Hall*, 4 Bro. Ch. 328; *Pollock v. Croft*, 1 Mer. 181.

<sup>3</sup> *Daley v. Desbouverie*, 2 Atk. 261; *D'Aguilar v. Drinkwater*, 2 V. & B. 225; *Merry v. Ryves*, 1 Eden, 1; *Worthington v. Evans*, 1 S. & S. 165; *Le Jeune v. Budd*, 6 Sim. 441.

<sup>4</sup> *Strange v. Smith*, Amb. 263; *Clarke v. Parker*, 19 Ves. 18; *Farmer v. Compton*, 1 Ch. R. 1.

<sup>5</sup> *D'Aguilar v. Drinkwater*, 2 V. & B. 225; *Clarke v. Parker*, 19 Ves. 12.

<sup>6</sup> *Worthington v. Evans*, 2 S. & S. 165.

<sup>7</sup> *Reynish v. Martin*, 3 Atk. 331; *Clarke v. Parker*, 19 Ves. 21; *Berkley v. Ryder*, 2 Ves. 532; *Long v. Ricketts*, 2 S. & S. 179; *Malcolm v. O'Callaghan*, 2 Madd. 349; *Hemmings v. Munckley*, 1 Bro. Ch. 304; *Frye v. Porter*, 1 Ch. Cas. 138; 1 Mod. 300. In *Burleton v. Humphrey*, Amb. 256, Lord Hardwicke held a different doctrine; but it has not been acted upon, and is not the law.

<sup>8</sup> *Weller v. Ker*, 1 Macq. H. L. Sc. App. Cas. 11.

(a) *In re Smith*, 44 Ch. D. 654, 658.

(b) See *Re Eyre*, 49 L. T. 259; *Saul v. Pattinson*, 55 L. J. Ch. 831.



until after the solemnization of it, it was held to be a compliance with the condition, as courts of equity may at all times relieve from accidents and mistakes.<sup>1</sup> If the trustees have once given their full consent to the marriage, with a knowledge of all the facts, they cannot withdraw it; for they have allowed the affections and feelings of the parties to become entangled, and it would be in the nature of a fraud to withdraw their consent.<sup>2</sup> But if any new facts should come to the knowledge of the trustees, which would render the marriage an improper one, they may withdraw their consent, and they ought to do so.<sup>3</sup>

§ 518. The consent of the trustees may be given conditionally, if the condition is not unreasonable. Thus an assent, *if a proper settlement is made*, or *if the cotrustees consent*, is conditional;<sup>4</sup> and if the parties fail or refuse to perform the condition, the consent may be withdrawn;<sup>5</sup> but if, in pursuance of the condition, a settlement is made after marriage, it will save the forfeiture.<sup>6</sup> All the trustees who accept the trust must consent,<sup>7</sup> unless the dissenting trustee is influenced by selfish and improper motives;<sup>8</sup> for if the testator has named the parties who are to assent, although he has used words to indicate that he attached no particular importance to the assent of all, yet the court cannot change the condition, and deprive those of their interest, to whom there is an express devise over.<sup>9</sup> A trustee may, however,

<sup>1</sup> Worthington v. Evans, 2 S. & S. 172; O'Callaghan v. Cooper, 5 Ves. 117.

<sup>2</sup> Le Jeune v. Budd, 6 Sim. 441; Farmer v. Compton, 1 Ch. R. 1; Strange v. Smith, Amb. 263; Merry v. Ryves, 1 Edm. 1; Dashwood v. Bulkely, 10 Ves. 242.

<sup>3</sup> D'Aguiar v. Drinkwater, 2 V. & B. 234; 1 Rop. Leg. 699.

<sup>4</sup> O'Callaghan v. Cooper, 5 Ves. 517; Dashwood v. Bulkely, 10 Ves. 230; D'Aguiar v. Drinkwater, 2 V. & B. 235.

<sup>5</sup> Dashwood v. Bulkely, 10 Ves. 230.

<sup>6</sup> O'Callaghan v. Cooper, 5 Ves. 117; 10 Ves. 230.

<sup>7</sup> Clarke v. Parker, 19 Ves. 12. The *dictum* in Harvey v. Aston, 1 Atk. 375, has not been followed.

<sup>8</sup> Peyton v. Bury, 2 P. Wms. 626; Mesgrett v. Mesgrett, 2 Vern. 580.

<sup>9</sup> Clarke v. Parker, 19 Ves. 12, 15.

authorize his co-trustee to consent for him, for that would be his own consent.<sup>1</sup> In general, the power to assent is given to the executors or trustees, *in that character*, and not *personally*, and those who renounce the trust have no power;<sup>2</sup> yet the power may be conferred upon an executor or trustee *personally*, so that his assent may be required, although he renounce the trust.<sup>3</sup> And a power may be so given to executors to sell lands that they may execute the power of selling the lands although they renounce the executorship.<sup>4</sup> If the power becomes impossible by the death of one or more of the trustees, it will be dispensed with so far as it is impossible to execute it literally;<sup>5</sup> and if all the trustees die, the power is absolutely gone. So, if the condition is subsequent, and the consent of the executors or trustees in the plural number is required, and one dies, the condition is gone;<sup>6</sup> but if the death of the original trustee is provided for by the appointment of a new one, and the power extends to him, then the consent of the trustees must be had.<sup>7</sup> After a considerable lapse of time, and no action taken to disturb the possession of the property, the consent of the trustees will be presumed to have been given in proper form.<sup>8</sup>

§ 519. The exercise of this discretionary power, of assenting to the marriage of the *cestui que trust*, is of so peculiar a nature that courts of equity will exercise a control over it, and will not suffer the power to be abused; they will examine into the conduct and motives of the persons refusing their assent, and ascertain whether the refusal proceeds from a

<sup>1</sup> Daley v. Desbouverie, 2 Atk. 261; Clarke v. Parker, 19 Ves. 12; D'Aguilar v. Drinkwater, 2 V. & B. 225, 235, 236.

<sup>2</sup> Worthington v. Evans, 1 S. & S. 165.

<sup>3</sup> Graydon v. Graydon, 2 Atk. 16, explained in 1 Rep. Leg. 695.

<sup>4</sup> Moody v. Fulmer, 3 Grant, 17.

<sup>5</sup> 1 Rep. Leg. 691.

<sup>6</sup> Peyton v. Bury, 2 P. Wms. 626; Jones v. Suffolk, 1 Bro. Ch. 528; Graydon v. Hicks, 2 Atk. 16-18; Aislabie v. Rice, 3 Madd. 256; 8 Taunt. 459; Grant v. Dyer, 2 Dow. 93.

<sup>7</sup> Clarke v. Parker, 19 Ves. 15.

<sup>8</sup> Re Birch, 17 Beav. 358.

corrupt, selfish, or improper motive; and if it does, the court will relieve from a forfeiture incurred by a marriage without consent.<sup>1</sup> Lord Eldon said, this was a “dangerous power” in the court, and one delicate and difficult to exercise.<sup>2</sup> But there is no question that the courts will exercise it in a proper case, as where the trustees refuse their assent from anger, pique, resentment, or from interested motives, as where some interest in the property would come to them or their families, in case of a marriage without their assent, or the death of the *cestui que trust* before marriage, or where the trustees have themselves promoted and procured the marriage.<sup>3</sup> So, where a trustee refused to assent or dissent to a proposed marriage of the beneficiary, the court sent the case to a master to inquire whether the marriage was a proper one, and to receive proposals for a settlement.<sup>4</sup>

<sup>1</sup> 1 Rop. Leg. 697.

<sup>2</sup> *Dashwood v. Bulkely*, 10 Ves. 245; *Clarke v. Parker*, 19 Ves. 12.

<sup>3</sup> *Mesgrett v. Mesgrett*, 2 Vern. 580; 10 Ves. 243; *Strange v. Smith*, Amb. 264; *Merry v. Ryves*, 1 Eden, 6; *Peyton v. Bury*, 2 P. Wms. 328; *Daley v. Desbouverie*, 2 Atk. 261; *Clarke v. Parker*, 19 Ves. 19.

<sup>4</sup> *Goldsmid v. Goldsmid*, 19 Ves. 368; *Coop.* 225.

## CHAPTER XVII.

TRUSTEES OF THE DRY LEGAL TITLE; TO PRESERVE CONTINGENT REMAINDERS; OF TERMS ATTENDANT; OF FREEHOLDS; AND OF LEASEHOLDS.

- §§ 520, 521. Powers and duties of trustees of the dry legal title.
- §§ 522, 523. Trustees of contingent remainders.
- §§ 524, 525. Trustees of attendant terms.
- § 526. Powers and duties of trustees in possession of freeholds.
- § 527. Must pay rates and taxes and collect rents.  
Leases.
- § 528. Trustee's power of leasing.
- §§ 529, 530. Their power where special directions are given as to leasing.
- § 531. Trustees of leaseholds.
- §§ 532, 533. Power and duty to renew leases.
- § 534. Who is to bear the expense of renewing leases.
- § 535. When trustees may not renew leases.
- § 536. Liability of trustees for covenants in leases.
- § 537. The fine for renewing a lease.
- § 538. The right to renew leases a valuable right. Trustees cannot renew in their own names.

§ 520. It is a *simple* or dry trust, when property is vested in one person in trust for another, and the nature of the trust, not being prescribed by the donor, is left to the construction of law.<sup>1</sup> (a) In such case the *cestui que trust* is

<sup>1</sup> Abolished in Alabama. The *cestui* takes at once the estate given to the trustee (Code of 1876, § 2185). See *Wilkinson v. May*, 69 Ala. 33;

(a) As to the distinction between simple and active trusts, see *Carney v. Byron*, 19 R. I. 283; *Dyett v. Central Trust Co.*, 140 N. Y. 51; *Clarke's Appeal*, 70 Conn. 195; *Harbster's Estate*, 133 Penn. St. 351; *McIntosh's Estate*, 158 id. 528; *Forney's Estate*, 161 id. 209; *Moorhead's Estate*, 180 id. 119; *Kreb's Estate*, 184 id. 222; *Everts v. Everts*, 80 Mich. 222; *Hart v. Seymour*, 147 Ill. 598; *Hannig v. Mueller*, 82 Wis. 235; *Henson v. Wright*, 88 Tenn. 501; *Story v. Palmer*, 46 N. J. Eq. 1; *Simmons v. Richardson*, 107 Ala. 697; *Byrne v. Gunning*, 74 Md. 80; *Carrigan v. Drake*, 36 S. C. 354; *Pugh v. Hayes*, 113 Mo. 424.

entitled to the actual possession and enjoyment of the property, and to dispose of it, or to call upon the trustee to execute such conveyances of the legal estate as he directs.<sup>1</sup> In short, the *cestui que trust* has an absolute control over the beneficial interest, together with a right to call for the legal title, and the person in whom the legal title vests is a *simple* or *dry trustee*.<sup>2</sup> (a) Settlers sometimes convey estates in this manner for an ulterior purpose; or an active trust having been accomplished, the legal title and the beneficial interest may have fallen into this condition. The duties and powers of such dry trustees of the legal estate are few and simple. They are usually said to be threefold, and similar to those of the old feoffees to uses: (1) To permit the *cestui que trust* to occupy and receive the incomes and profits of the estate. (2) To execute such conveyances, or make such disposition of the estate as the *cestui que trust* may direct. In such case, if the trustee has made advances to the *cestui que trust* upon the credit of the land, the decree to convey should provide for the repayment of them.<sup>3</sup> The *cestui que trust* cannot, however, call for a conveyance, if such conveyance is inconsistent with all the agreements and purposes of the trust.<sup>4</sup> (b) If a trustee is to convey to children, he cannot be compelled to convey before all the children who may take under gift are born.<sup>5</sup> (3) To protect and defend the title, or to allow their

*Webb v. Crawford*, 77 Ala. 440; *Gosson v. Ladd*, id. 224; see also *Sutton v. Aiken*, 62 Ga. 733; *Elliot v. Deason*, 64 id. 63. The same thing is held in Illinois. *Witham v. Brooner*, 63 Ill. 344; *Lynch v. Swayne*, 83 id. 336; *Kirkland v. Cox*, 94 id. 400; *Long v. Long*, 62 Md. 33; *Owens v. Crow*, 62 Md. 491; *Farmers' Nat'l Bank v. Moran*, 30 Minn. 165. But if the *cestuis* are not *sui juris*, the estate vests in the trustee. *Dean v. Long*, 122 Ill. 458.

<sup>1</sup> Lewin on Trusts, 18.

<sup>2</sup> Hill on Trustees, 316.

<sup>3</sup> *Robles v. Clarke*, 25 Cal. 317.

<sup>4</sup> *Thompson v. Galloupe*, 100 Mass. 435.

<sup>5</sup> *Dial v. Dial*, 21 Tex. 529.

(a) See *supra*, § 299, and cases 452, 453, 455. All of several *cestuis que trust* must concur in requiring a conveyance.

(b) *Gerard v. Buckley*, 137 Mass. 475; 1 Ames on Trusts (2d ed.),

names to be used for that purpose.<sup>1</sup> At law they are the legal owners of the estate, and their names must be used in all suits at law affecting the legal title;<sup>2</sup> but in equity the *cestui que trust* is the owner, and the trustees will be restrained by injunction from using their power over the legal title to the injury of the *cestui que trust*.<sup>3</sup> If such trustees refuse from improper motives to convey the dry legal title when required by a person clearly entitled to the equitable interest, the court will decree a conveyance, and impose costs upon the trustees for their refusal.<sup>4</sup> Even in an action at law, in the name of the trustee for the benefit of the *cestui que trust*, the trustee cannot release or discontinue the action, without the consent of the beneficiary; and if he does so, courts of law will set aside the release;<sup>5</sup> but where a trustee's name is thus used for the benefit of the *cestui que trust*, he is entitled to be indemnified against the costs, and the *cestui que trust* may be restrained in equity from proceeding until he has furnished such security.<sup>6</sup>

§ 521. In a simple trust of this nature, the dry trustee has no power of managing, or disposing of the estate, even al-

<sup>1</sup> 1 Cruise, Dig. tit. 12, c. 4, § 6.

<sup>2</sup> Goodtitle v. Jones, 7 T. R. 47; Wake v. Tinkler, 16 East, 36; Cox v. Walker, 26 Me. 504; Methodist Soc. of Georgetown v. Bennett, 39 Conn. 293; First Bap. Soc. in Andover v. Hazen, 100 Mass. 322; Beach v. Beach, 14 Vt. 28; Matthews v. Ward, 10 G. & John. 443; Moore v. Burnet, 11 Ohio, 334; Wright v. Douglass, 3 Barb. 559; Mordecai v. Parker, 3 Dev. 425. In Pennsylvania, however, the action of ejectment is an equitable action, and the *cestui que trust* can maintain it for the possession even against the trustee. (a)

<sup>3</sup> Balls v. Strutt, 1 Hare, 146.

<sup>4</sup> Boteller v. Allington, 1 Bro. Ch. 73; Willis v. Hiscox, 4 Myl. & Cr. 197; Jones v. Lewis, 1 Cox, 199; Lyse v. Kingdom, 1 Coll. 184; Penfold v. Bouch, 4 Hare, 471; Watts v. Turner, 1 R. & M. 634; Buttanshaw v. Martin, Johns. 89; Boskerck v. Herrick, 65 Barb. 250.

<sup>5</sup> Manning v. Cox, 7 Moore, 617; Barker v. Richardson, 1 Yo. & Jer. 362; Chitty, Contr. 605; McClurg v. Wilson, 43 Penn. St. 439.

<sup>6</sup> Annesley v. Simeon, 4 Madd. 390; Chambersburg Ins. Co. v. Smith, 11 Penn. St. 120.

(a) See *supra*, § 328.

though the *cestui que trust* is an infant, married woman, lunatic, or other person incapable of the management or control. Nor can he alter the nature of the property, by changing real estate into personal, or *vice versa*.<sup>1</sup> But there is this qualification of the rule, — if a trustee, having the legal title, and being in possession, makes a conveyance for a valuable consideration to a purchaser who has no notice of the trust, the title of the purchaser will prevail.<sup>2</sup> Such a transaction, however, under our registry laws is almost impossible, for the recording of the settlement or other deeds of the property is notice to all the world of the trust. So impersonal are the relations of dry trustees to the *cestui que trust*, that it is said they may purchase the estate of the beneficiary.<sup>3</sup> It is further to be remarked, that there can be but few of these dry trusts; for where there is no control, and no duty to be performed by the trustee, it becomes a simple use, which the statute of uses executes in the *cestui que trust*; and he thus unites both the legal and beneficial estate in himself.<sup>4</sup>

§ 522. Trusts to preserve contingent remainders are less frequent in this country than in England; and they are less frequent in England since the statute of 8 & 9 Vict. c. 106, which enacted that a contingent remainder should be deemed capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner and in all respects as if such determination had not happened. In consequence of this act, there is no necessity for any machinery to preserve contingent remainders. Previous to the act, where there were no trustees to preserve them, they could be destroyed in two ways: First, contingent remainders were extinguishable by the surrender or merger of the particular estate in the inheritance; as, if lands were limited to A. for life, with remain-

<sup>1</sup> *Furiam v. Saunders*, 7 Bac. Abr. Uses and Trusts, E.; *Witter v. Witter*, 3 P. Wms. 100.

<sup>2</sup> *Millard's Case*, 2 Freem. 43; *Bovey v. Smith*, 1 Vern. 149.

<sup>3</sup> *Parker v. White*, 11 Ves. 226.

<sup>4</sup> *Peck v. Brown*, 2 Rob. (N. Y.) 119; *Davis v. Rhodes*, 39 Miss. 152.

der to his unborn children, with remainder to B., A. might surrender his life-estate to B., or B. might release his remainder to A., or both A. and B. might join in a conveyance of the fee; and thus in each case the contingent remainder was squeezed out, and if children were afterwards born to A. they had no remedy in law or equity. Second, they could be extinguished by the tenant for life with the concurrence of the person who stood next in the series of limitations; as, where the oldest son or heir of the tenant for life, being of age and next in the series, could unite with his father in making a tenant to the *præcipe* to bar all subsequent remainders. Thus the estate became the absolute property of the father and son, and the subsequent interests in remainder were sacrificed, except so far as father and son might choose to give them effect.<sup>1</sup>

§ 523. To obviate these results, settlements were drawn in one of two modes: First, the legal estate was limited to the use of the parent for ninety-nine years, if he should live so long, with remainder to the use of trustees and their heirs, during the life of the termor upon trust to preserve the contingent limitations, and on his death to other uses in remainder; or to the use of trustees and their heirs, during the life of the parent in trust for him, and on his death to the other uses in remainder. Secondly, the use was to the parent for life, with remainder to trustees and their heirs, during the life of the parent, in trust to preserve the contingent limitations, and on his death to other uses in remainder. In the first form of settlement, the object in view, by vesting the freehold in trustees, was to preserve the contingent limitations from being destroyed by the surrender or merger of the particular estate, which would have been practicable had the freehold been limited to the parent himself, and also to prevent the barring of the entail and the alienation of the estate for purposes not authorized by the spirit of the settlement. In the second form, it was the duty of the trustees, as before, to preserve the contingent limitations;

<sup>1</sup> Lewin on Trusts, 308.



but, as the freehold in possession was vested in the parent, the trustees had no power to prevent a recovery by the father and son as soon as the son came of age; but if the tenant for life committed a forfeiture, as by a feoffment in fee in order to defeat the contingent remainders, it was then the duty of the trustees to enter and so vest the possession of the freehold in themselves; and it was their further duty, as in the first form, though the settlor himself might not have contemplated such a purpose, not to concur in putting an end to the settlement, except where such interference was prudent and proper.<sup>1</sup>

§ 524. Where a term for years is created by mortgage or by will for securing jointures or portions, or where a term is carved out of the inheritance for any particular purpose, and there is no condition in the instrument that the term shall cease when the purposes of its creation are satisfied, although the term or time for which it was carved out has not elapsed, the holder of the term for the remainder of the time holds it in trust for the owner of the inheritance, and it is said to be

<sup>1</sup> Lewin on Trusts, 309 (5th Lond. ed.), 404 (2d Amer. ed.). There is a very considerable amount of learning in the books upon the duty of trustees under these circumstances: when they should concur in determining the contingent estates, when they should concur in changing the uses and the limitations for the accommodation and benefit of families, and when they should apply to the court for instruction and direction in the performance of their duties. The statute 8 & 9 Vict. c. 106, renders the machinery of trustees to preserve contingent remainders no longer necessary in England, and Mr. Lewin has left all the learning upon the subject out of the last edition of his valuable treatise on Trusts. The reader will find it in the second American edition, and in Hill on Trustees, 318. It is not thought necessary to pursue the subject further, as, in nearly all the American States, statutes similar to the statute of 8 & 9 Vict. render trustees unnecessary to preserve such remainders. Mr. Washburn cites the statutes of the various States. 2 Wash. Real Prop. pp. 202, 262, 263, 266 (1st ed.). See also Hill on Trustees, 318, n.; 2 Green. Cruise, 270, and n.; 285, n.; 4 Kent, Com. 255. In Pennsylvania, however, trustees may still be necessary for this purpose. *Dunwoodie v. Reed*, 3 Serg. & R. 435; *Toman v. Dunlop*, 8 Penn. St. 72. The case of *Vanderheyden v. Crandall*, 2 Denio, 9, was decided before the change by the statutes in New York.

a term attendant upon the legal title. It is sometimes convenient in English conveyancing to keep these terms outstanding in the hands of a trustee, as the owner has the right to call at any time for a conveyance of them to himself; and such term may give the owner of the inheritance a legal title to the possession, anterior to some possible incumbrances that may have been put upon the estate prior to his purchase of the inheritance. In the same manner, purchasers in America sometimes take assignments of mortgages made long before their purchase, in order, by foreclosure or otherwise, to gain a title prior to other possible incumbrances, anterior to their purchase of the fee.

§ 525. Trustees of these dry terms hold them in trust for the owners of the inheritance. The rights and duties of the trustees of such terms are very similar to the rights and duties of trustees of the dry legal estate.<sup>1</sup>

§ 526. Trustees of freeholds are the legal owners of the estate, and they alone can be recognized in a court of law.<sup>2</sup> Their right to the possession will depend entirely upon the construction of the instrument of trust, and the nature of the duties required.<sup>3</sup> If their duties are such that they cannot perform them without the possession, the court will give it to them.<sup>4</sup> The situation and condition, therefore, of the *cestuis que trust* may be important on the question of the possession and control of the trustee; as, if the *cestui que trust* is a married woman, an infant, or a lunatic, incapable of managing or controlling the estate, the trustee must of necessity have the possession and management.<sup>5</sup> If the trustees

<sup>1</sup> These terms are now abolished in England by stat. 8 & 9 Vict. c. 112, and have ceased to be important. They never prevailed to any great extent in this country, and it is not necessary to enlarge upon the subject. The reader who desires to see the learning upon this matter will find it in Hill on Trustees, 324, 329; 1 Green. Cruise, 414, 418, 424, 442, 443; 2 Green. Cruise, 63, 170.

<sup>2</sup> *Ante*, § 523; Wickhem v. Berry, 55 Penn. St. 70.

<sup>3</sup> *Ante*, § 329.

<sup>4</sup> *Ibid.*; Tidd v. Lister, 5 Madd. 433.

<sup>5</sup> Tidd v. Lister, 5 Madd. 433.

have the possession, control, and management, they may make necessary repairs;<sup>1</sup> but, without some general or special authority, they cannot enter upon large improvements.<sup>2</sup> (a) If they are trustees for the sale of land they will not be allowed for improvements,<sup>3</sup> and no allowance can be made for cultivating such lands;<sup>4</sup> nor will the trustees be responsible for not renting land that comes to them in trust for sale.<sup>5</sup>

§ 527. Where trustees are in possession, and have the management of the estate, they must pay all rates and taxes,<sup>6</sup> and protect the estate from tax sales; they may, therefore, insure, and good management would demand it, but they are not bound to do so.<sup>7</sup> Where they have the management,

<sup>1</sup> *Fontaine v. Pellet*, 1 Ves. Jr. 337; *Green v. Winter*, 1 Johns. Ch. 26. A trustee, having authority to make repairs, may by express agreement make the expenditure for repairs a charge upon the estate, but he cannot, by a subsequent promise to pay out of the estate, give a lien upon it. *New v. Nicoll*, 73 N. Y. 127; *Stanton v. King*, 8 Hun (N. Y.), 4; *Austin v. Munro*, 47 N. Y. 360.

<sup>2</sup> *Ibid.*; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 34; *Wykoff v. Wykoff*, 3 Watts & S. 481; *Ames v. Downing*, 1 Bradf. 321; *Dickinson v. Conniff*, 65 Ala. 581. The cost of improvements made in reliance on the trust estate, with a promise by trustee to pay for them, may be a charge upon the estate to the extent that the value of the estate is enhanced thereby, at least in cases where the trustee resides abroad, and so cannot be personally reached by the persons making the improvements. *Field v. Wilbur*, 49 Ver. 157. But the general rule is that the trustee must be looked to, and it is clear that an administrator has no power to borrow money and charge the trust estate. *Bank v. Weeks*, 53 Vt. 115. A general power of management may give a power to make permanent improvements. *Bowes v. Strathmore*, 8 Jur. 92.

<sup>3</sup> *Green v. Winter*, 1 Johns. Ch. 28; *Thompson v. Thompson*, 16 Wis. 91.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Burr v. McEwen*, Baldw. C. C. 154; *Griffin v. Macaulay*, 7 Grat. 476.

<sup>6</sup> *Burr v. McEwen*, Baldw. C. C. 154; *Lovat v. Leeds*, 31 L. J. Ch. 503.

<sup>7</sup> *Ibid.*

(a) *In re Cole's Estate* (Wis.), 78 N. W. 402.

they must use due diligence in collecting rents. If they are directed to accumulate the rents, or to receive them for any other purpose, they will become personally liable if they allow the tenants to fall in arrear, and a loss is thus imposed upon the estate.<sup>1</sup>

§ 528. When trustees are charged with the payment of annuities, debts, or legacies, or any other sums out of the estate, but have no power of sale, they have an implied power of leasing upon the ordinary terms or custom of the State or town in which the land is situated.<sup>2</sup> If the trust consists of farming lands, the trustees can grant ordinary farming leases; if of houses in a city, they can grant the ordinary leases of such property.<sup>3</sup> But they will not be justified in granting any unusual leases; as building-leases, (a) or leases for a long term,<sup>4</sup> or of unopened mines.<sup>5</sup> If, under such circumstances, a trustee uses due diligence in granting a lease at a proper rent, and for a proper term, he will not be responsible, although a much larger sum may be obtained, before the lease expires, by reason of an increase or rise in rents.<sup>6</sup> It is said that the neglect must approximate fraud to impose such a liability upon a trustee.<sup>7</sup> If, however, the estate consists of a plantation and slaves, or of a farm fully stocked, the trustee may not lease it at all, but he may employ the personal property upon the estate in its cultivation.<sup>8</sup> If the tenant for life in occupation of the lands be-

<sup>1</sup> *Tebbs v. Carpenter*, 1 Madd. 290.

<sup>2</sup> *Naylor v. Arnitt*, 1 R. & M. 501; *Newcomb v. Keteltas*, 19 Barb. 608; *Hedges v. Riker*, 5 Johns. Ch. 163; *Black v. Ligon*, Harp. Eq. 205.

<sup>3</sup> *Ibid.*; *Greason v. Keteltas*, 17 N. Y. 491; *Pearse v. Baron*, Jac. 158.

<sup>4</sup> *Greason v. Keteltas*, 17 N. Y. 491; *Pearse v. Baron*, Jac. 158.

<sup>5</sup> *Clegg v. Rowland*, L. R. 2 Eq. 160.

<sup>6</sup> *Ferraby v. Hobson*, 2 Phill. 255.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Dennis v. Dennis*, 15 Md. 73.

(a) A building lease is valid in equity when the lessee is in possession under a contract with the *re James*, 64 L. J. Ch. 686. The donee of the power for a lease. execution of a lease may be enforced *Taussig v. Reel*, 134 Mo. 530.

comes insolvent, and his rent is largely in arrear, the trustees will be reimbursed for all the necessary expenses of ejecting him, and they will be justified in releasing to him the arrears of rent, and in paying a *bonus* as among the expenses of obtaining the possession. These expenses are for the benefit of the estate.<sup>1</sup> Under the general implied powers of leasing, trustees can only grant a lease in possession, and cannot grant a lease in reversion;<sup>2</sup> and it is doubted if they can make a lease to commence at a future day.<sup>3</sup> If the trust is only for a life, the trustees cannot bind the remainder-men by a covenant to renew in a lease executed by them.<sup>4</sup>

§ 529. If special powers of leasing are conferred upon trustees, they must follow the powers strictly. Any deviation from the manner of leasing pointed out in the trust instrument would be a breach of the trust. Thus, where leases are to be in possession and not in reversion, or where the lessor is not to take any fine or premium from the lessee, a lease made contrary to these powers is improper and would be set aside.<sup>5</sup> Where there is power to lease for a certain number of years, a lease for a less number is good,<sup>6</sup> but a lease for a longer term than that prescribed is bad, as contrary to the power;<sup>7</sup> although it is said, that such a lease may be sustained in equity for the proper number of years, and that the excess only is void.<sup>8</sup> It has been held, however, where there was a direction to keep mines constantly leased upon leases not exceeding five years, and it was found that good tenants could not be obtained for so short a term, and that leases for such a term would destroy the mines, that a court of equity could direct leases to be made for a longer

<sup>1</sup> *Blue v. Marshall*, 3 P. Wms. 381.

<sup>2</sup> *Sussex v. Worth*, Cro. Eliz. 5; 2 Sugd. on Pow. 370.

<sup>3</sup> *Sinclair v. Jackson*, 8 Cow. 581.

<sup>4</sup> *Bergengren v. Aldrich*, 139 Mass. 259.

<sup>5</sup> *Bowes v. East London Water Works Co.*, 3 Madd. 375; Jac. 324.

<sup>6</sup> *Isherwood v. Oldknow*, 3 M. & S. 382.

<sup>7</sup> *Sinclair v. Jackson*, 8 Cow. 581.

<sup>8</sup> *Pawcey v. Bowen*, 1 Ch. Cas. 23; 3 Ch. R. 11.

term, as for fifteen years.<sup>1</sup> Under a power to lease for twenty-one years, a lease for twenty-one years, determinable at the option of the lessee, is a good execution of the power;<sup>2</sup> but where lands, not within the authority to lease, are joined in the same lease at one rent with lands within the power, the whole lease is without authority, for there can be no apportionment of the rent.<sup>3</sup> If the lease is not strictly within the terms of the special power, the receiving of rent by the *cestuis que trust* for several years will not confirm the lease, unless they are aware of the defective execution of the power.<sup>4</sup> It seems to be in accordance with sound principle, that a lease, which is void for want of power in the trustee to execute it, is incapable of confirmation by the *cestuis que trust*, who have no power either to make or confirm leases;<sup>5</sup> but perhaps a long acquiescence by them in occupation under the lease, accompanied by valuable improvements made by the lessee, might estop them from setting up a claim to avoid the lease.<sup>6</sup> (a) If the freehold is vested in the trustees, the lease will take effect out of their legal interest, and will be valid in law, though it may be a breach of the trust; but a court of equity can in all cases set aside any conveyance or lease which is a breach of the trust.<sup>7</sup> (b) If there is any fraud or collusion in the trustee, the lease will be set aside, or the lessee may be converted into a trustee; as, where the trustee and a third person by collusion suffered a lease to be forfeited, in order that such person might obtain the lease to himself, he was held to be a constructive trustee.<sup>8</sup>

<sup>1</sup> Matter of Philadelphia, 2 Brews. 426.

<sup>2</sup> Edwards v. Millbank, 4 Drew. 606.

<sup>3</sup> Doe v. Stevens, 6 Q. B. 208.

<sup>4</sup> Bowes v. East London Water Works Co., 3 Madd. 375; Jac. 324.

<sup>5</sup> Sinclair v. Jackson, 8 Cow. 581.

<sup>6</sup> Black v. Ligon, Harp. Eq. 205. But see 4 Kent, 107.

<sup>7</sup> Bowes v. East London Water Works Co., 3 Madd. 375; Jac. 324.

<sup>8</sup> Aspinall v. Jones, 2 Bennett (Mo.), 209.

(a) A lease by a mere naked landlord. White v. Cannon, 125 trustee, when assented to by the Ill. 412.

beneficiary, is practically the act of (b) Gomez v. Gomez, 147 N. Y. the latter, who has the rights of the 195.

§ 530. Where the special power is to lease lands usually let, or upon the usual rent, it will apply *prima facie* to such lands only as have been generally let, and to the ordinary adequate rent;<sup>1</sup> but where the general scope of the whole instrument involves an intention that all the lands shall be let, the words will be construed to embrace all;<sup>2</sup> and the joining of several parcels of land in one lease, which have been *usually* let separately, will not vitiate the execution of the power.<sup>3</sup> The *usual* rent means the old and uniform custom, and not the rent reserved on a single lease, executed just before the creation of the power.<sup>4</sup> Where the power is to make a lease containing "usual and reasonable covenants," the rule is to follow a lease of the lands in existence at the time of the creation of the power, if there is such a lease.<sup>5</sup> Where a widow was to have the right to cultivate as much land as she pleased, and the executors were to lease the balance, the power of leasing was held to extend to the whole estate, upon the death of the widow.<sup>6</sup> If the trustees have a fee, determinable upon a contingent event, they nevertheless have power to make a lease to extend beyond their interest in the land.<sup>7</sup> A power to lease for lives will not authorize a lease for years; but under a power to lease not exceeding twenty-one years, or three lives, a lease for years may be granted.<sup>8</sup> So a lease for two lives will be good under a power to lease for three lives.<sup>9</sup> In granting a lease for lives, it must be during lives in being, and all must be running at the same time;<sup>10</sup> if some of the lives have expired, there is authority to grant a lease during the life of the survivor.<sup>11</sup> A power to

<sup>1</sup> *Cardigan v. Montague*, 2 Sugd. Pow. App. 14, 339; *Orbey v. Mohun*, 2 Vern. 531; Pr. Ch. 257; 2 Roll. Ab. 261, pl. 11, 12.

<sup>2</sup> *Goodtitle v. Funucan*, Doug. 565; 2 Sugd. Pow. 349.

<sup>3</sup> *Doe v. Stephens*, 6 Q. B. 208; *Doe v. Williams*, 11 Q. B. 688.

<sup>4</sup> *Doe v. Hole*, 15 Q. B. 848.

<sup>5</sup> *Doe v. Stephens*, 6 Q. B. 208.

<sup>6</sup> *Hoyle v. Stowe*, 2 Dev. 318.

<sup>7</sup> *Greason v. Keteltas*, 17 N. Y. 491.

<sup>8</sup> *Whitlock's Case*, 8 Co. R. 69 b; 1 Sugd. Pow. 514; 2 id. 354.

<sup>9</sup> 2 Sugd. Pow. 365.

<sup>10</sup> *Doe v. Halcombe*, 7 T. R. 13; 2 Sugd. Pow. 364; Raym. 263.

<sup>11</sup> *Doe v. Hardwicke*, 10 East, 549.

lease land generally will not authorize a lease of unopened mines, but a general power will authorize a lease of opened mines.<sup>1</sup> Trustees should not grant leases of mines without impeachment of waste.<sup>2</sup> In deciding the length of the term for which the lease may be granted, trustees must be guided by the best interests of the estate; at law they may exercise the power by granting the longest term;<sup>3</sup> but in equity they are subject to the supervision of the court.<sup>4</sup> If they enter into covenants in leases, they will be personally bound.<sup>5</sup> Whether the heirs of the testator, the trustee having refused to act, can execute the power of leasing depends upon the terms of the power, whether it is a personal confidence, or is a trust that goes with the estate and office of the trustee.<sup>6</sup>

§ 531. Where the trust property consists of leasehold estates, questions often arise respecting the duty of the trustees to renew, and on whom the expense shall fall. These estates are not so common in the United States as in England; but it may be important to state the law on the subject, together with the American authorities. It has before been stated, that where a leasehold is limited in the instrument of trust to a tenant for life with remainder over, and is rapidly diminishing in value through the expiration of the term, it is the duty of the trustee to sell the lease and invest the proceeds, and to pay the income of such investment to the tenant for life, and the principal to the remainderman. Where there is a *specific* gift of the leasehold, or other depreciating property, the tenant is entitled to receive the income *in specie*.

<sup>1</sup> Clegg v. Rowland, L. R. 2 Eq. 160.

<sup>2</sup> Campbell v. Leach, Amb. 740; Daly v. Beckett, 6 C. B. 114; Lee v. Balcarras, id. 849.

<sup>3</sup> Muskerry v. Chinnery, Llo. & Goo. 185; 1 Sugd. Pow. 548.

<sup>4</sup> Sutton v. Jones, 15 Ves. 587; Black v. Ligon, Harp. Eq. 205; 4 Kent, 107.

<sup>5</sup> Greason v. Keteltas, 17 N. Y. 491.

<sup>6</sup> Robson v. Flight, 10 Jur. (N. S.) 1228; 11 Jur. (N. S.) 147; 5 N. R. 344; 34 Beav. 110.



§ 532. It is the duty of the trustees to renew all leases at the regular periods, where an *express* trust is created for that purpose.<sup>1</sup> In the absence of such trust, the duty may be *implied* from the expressions used by the settlor, or from the whole scope of the instrument.<sup>2</sup> In the absence of such guides, it has been held that where a leasehold interest is settled in trust for life with remainders over, it must be the general intention that the interest should continue, and be preserved for the benefit of all who take under the limitations of the trust; and that it is the duty of the trustees to renew, although there are no particular or general expressions directing a renewal.<sup>3</sup> So in the case of marriage articles, if renewable leaseholds are part of the estates to be settled, the court will order a direction to the trustees to renew to be inserted in the settlement.<sup>4</sup> If the trustees have a power of renewal in the form of a *discretionary* power, it will generally be construed as an absolute direction to renew, but the manner and time may be optional; for where trustees are appointed to preserve estates for those who are to take in succession, it can hardly be supposed that it would be left discretionary with them to destroy the interests of those who are to take in the future.<sup>5</sup>

§ 533. The mere fact that renewable leaseholds are settled upon persons to take in succession does not *per se* give

<sup>1</sup> Montford v. Cadogan, 17 Ves. 485; 19 Ves. 635; 2 Mer. 3; Colegrave v. Manby, 6 Madd. 72; 2 Russ. 238; Bennett v. Colley, 5 Sim. 181; 2 Myl. & K. 235.

<sup>2</sup> Curtis v. Lukin, 5 Beav. 147; Lock v. Lock, 2 Vern. 666; Hulkes v. Barrow, Taml. 264.

<sup>3</sup> Verney v. Verney, Amb. 88; 1 Ves. 428; White v. White, 4 Ves. 33; Montford v. Cadogan, 17 Ves. 485; 19 Ves. 638; Lock v. Lock, 2 Vern. 666; Milsington v. Mulgrave, 3 Madd. 491; 5 Madd. 471; Hulkes v. Barrow, Taml. 264.

<sup>4</sup> Graham v. Londonderry, cited Stone v. Theed, 2 Bro. Ch. 246; Pickering v. Vowles, 1 id. 197.

<sup>5</sup> Milsington v. Mulgrave, 3 Madd. 491; 5 id. 472; Mortimer v. Watts, 14 Beav. 616; Verney v. Verney, 1 Ves. 430; Harvey v. Harvey, 5 Beav. 134; Luther v. Bianconi, 10 Ir. Eq. 203.

the remainder-man a right to call upon the tenant for life to pay the expenses of a renewal.<sup>1</sup> In such case it is within the discretion of the tenant for life to renew. And even where a devise was made to a tenant for life, subject to all fines as they became due yearly and for every year, the tenant for life was not obliged to renew.<sup>2</sup> But if the tenant for life does renew, he cannot use his renewal to deprive the remainder-man of his rights, but such remainder-man will be entitled to the interest given him under the settlement, upon paying the proportional part of the expenses of renewal;<sup>3</sup> (a) nor will the mere fact of the *interposition of a trustee* in the settlement indicate an intention that the tenant for life shall renew;<sup>4</sup> but such duties may be imposed directly, or by implication that a renewal must be made.<sup>5</sup>

§ 534. If trustees neglect to renew leases, they will be liable to the *cestuis que trust* for all the loss and damage that accrue by reason of the neglect. Thus, if a remainder-man subsequently effects a renewal at an increased cost and expense, they must reimburse him, or they may be ordered to renew at their own expense.<sup>6</sup> If the tenant for life has received an increased income by reason of the non-renewal, the trustees may withhold income from him to equalize what they may have been obliged to pay. If there are two successive tenants for life, they must contribute according to the duration of their respective interests.<sup>7</sup> The same principles

<sup>1</sup> *White v. White*, 4 Ves. 32; 9 Ves. 561; *Nightingale v. Lawson*, 1 Bro. Ch. 443; *Stone v. Theed*, 2 id. 248; *Capel v. Wood*, 4 Russ. 500.

<sup>2</sup> *Capel v. Wood*, 4 Russ. 500.

<sup>3</sup> *Stone v. Theed*, 2 Bro. Ch. 248; *Coppin v. Fernyhough*, id. 241; *Nightingale v. Lawson*, 1 id. 440; *Fitzroy v. Howard*, 3 Russ. 225.

<sup>4</sup> *O'Ferrall v. O'Ferrall*, Llo. & Goo. t. Plunk. 79; *French v. St. George*, 1 Dr. & Wals. 417; *Lawrence v. Maggs*, 1 Eden, 453.

<sup>5</sup> *Verney v. Verney*, 1 Ves. 429; *White v. White*, 4 Ves. 33; *Hulkes v. Barrow*, Tambl. 264; *Lock v. Lock*, 2 Vern. 666.

<sup>6</sup> *Montford v. Cadogan*, 17 Ves. 485; 19 Ves. 635; 2 Mer. 3; *Colegrave v. Manby*, 6 Madd. 87; 2 Russ. 238; *Milsington v. Mulgrave*, 2 Madd. 491; 5 Madd. 472.

<sup>7</sup> *Ibid.*

(a) *Bradford v. Brownjohn*, 37 L. J. Ch. 198.

are applicable where estates are settled without the intervention of a trustee, and the tenant for life is directed to renew. The remainder-man may renew in case of neglect by the tenant for life, and call upon his estate for reimbursement; and if the lease has expired and is lost, so that it cannot be renewed, the remainder-man may have compensation in damages.<sup>1</sup> But if the remainder-man pays an unreasonable sum for the renewal, the estate of the tenant for life will not be compelled to pay the whole, but the court will refer it to a master to determine a reasonable amount.<sup>2</sup> A purchaser from the tenant for life is not, however, compelled to make these payments, although he has notice of the settlement, unless the assignment to him expressly provides that the interest taken by him is subject to a trust for renewal.<sup>3</sup>

§ 535. Trustees, however, will not be liable for not renewing, where the trust for renewal cannot be carried into effect on account of its illegality, or their covenant to renew cannot be fulfilled because of the termination of their trust.<sup>4</sup> If there is an illegal direction to accumulate rents and profits, for the purpose of renewal, the trustee cannot be called upon to renew, for the reason that the fund, from which he is to pay the expenses of renewal, cannot legally exist.<sup>5</sup> So a lessor is not obliged to renew a lease, unless it contains covenants to that effect. Therefore, if the lessor refuses to renew, or if he demands unreasonable terms, the trustees are not liable for not renewing.<sup>6</sup> In such case, however, the tenant for life cannot be allowed the exclusive benefit of the non-renewal; but so much of the expenses as would have come out of his interest will be invested for the benefit of

<sup>1</sup> *Colegrave v. Manby*, 6 Madd. 87; 2 Russ. 238; *Bennett v. Colley*, 5 Sim. 181; 2 Myl. & K. 225.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Montford v. Cadogan*, 19 Ves. 635.

<sup>4</sup> See § 528.

<sup>5</sup> *Curtis v. Lukin*, 5 Beav. 147.

<sup>6</sup> *Colegrave v. Manby*, 6 Madd. 82; *Tardiff v. Robinson*, *id.* 83, n.

the *cestuis que trust*, including the remainder-men.<sup>1</sup> If a leasehold is a loss to the estate, by calling for the payment of more rent than is received, the trustees must get rid of the leasehold by assignment, and they have been held responsible for not doing so.<sup>2</sup>

§ 536. The trustee in whom the leasehold interest vests, by the settlement or will, is liable, as assignee of the lease, to perform all its covenants during the continuance of his interest. Therefore, if he ceases to be trustee or assign the lease, he will be liable for no covenants, unless they are broken while it was held by him.<sup>3</sup> But an executor of a lessee is liable upon the covenants, by reason of the privity of estate;<sup>4</sup> and so a trustee will be liable, if he has bound himself personally. On this account, an executor or trustee cannot be required by the *cestuis que trust* to assign over the estate before he is indemnified for such liability.<sup>5</sup>

§ 537. By the law of tenures, as established under the feudal system, the tenant was obliged to pay a fee or fine to his superior lord, upon every alienation of his land, whether in fee, or for life or for years. Hence, to this day in England, upon every renewal of a lease, there is a fine or a fee, considerable in amount, to be paid.<sup>6</sup> In the United States, all such restraints upon the alienation of lands are inconsistent with the spirit of our laws and institutions, and are absolutely void, even if annexed as terms or conditions in the instruments under which the lands are held.<sup>7</sup> Therefore, one great head of equity jurisdiction, in the matter of

<sup>1</sup> Ibid.; *Bennett v. Colley*, 2 Myl. & K. 231; 5 Sim. 181.

<sup>2</sup> *Rowley v. Adams*, 4 Myl. & Cr. 534.

<sup>3</sup> *Onslow v. Corrie*, 2 Madd. 330; *Valliant v. Dodemede*, 2 Atk. 546; *Pitcher v. Toovey*, 1 Salk. 81; 2 Ventr. 228; *Taylor v. Shum*, 1 B. & P. 21; *Rowley v. Adams*, 4 Myl. & Cr. 532; *Trevel v. Coke*, 1 Vern. 165.

<sup>4</sup> *Brett v. Cumberland*, Cro. Jac. 521.

<sup>5</sup> *Simmonds v. Borland*, 3 Mer. 567; *Marsh v. Wells*, 2 S. & S. 90.

<sup>6</sup> 2 Black. Com. 72.

<sup>7</sup> *Livingston v. Stickles*, 8 Paige, 398; *De Peyster v. Michael*, 6 N. Y. 467; *Overbagh v. Petrie*, id. 510; 8 Barb. 28.

trusts in leasehold estates, is obsolete in the United States. In England, it is frequently a matter of doubt and construction to determine whose estate and interest shall pay the fine and expenses of the renewal.<sup>1</sup>

§ 538. The right to renew a lease is a valuable right, and may be sold and conveyed.<sup>2</sup> Courts recognize this right, and protect it for the benefit of the trust estate. If trustees are deprived of this right by the acts of third persons, they are entitled to compensation; as where the land is taken for public works, by virtue of some statute, trustees, having a right by custom or by covenant to renew a lease, will have the right to compensation for the land taken.<sup>3</sup> Nor can a trustee renew a lease, in his individual name and for his private benefit, even if the lessor utterly refuses to renew the lease for the benefit of the *cestui que trust*;<sup>4</sup> for the reason that the trustee cannot avail himself of his situation to make any advantage or profit to himself, and if he makes a profit by renewing a lease in his own name, it inures to the benefit of the trust estate, or he shall continue to hold it as trustee.<sup>5</sup> The same rule extends to all persons who hold any position of influence and confidence in respect to others, as tenants for life, (a) tenants in common, and partners. All

<sup>1</sup> For the reasons stated in the text, it is not important in this country to notice all the rules and distinctions which have been established by the authorities in England. If important, they may be found in Lewin on Trusts, 295-308, and Hill on Trustees, 434-439.

<sup>2</sup> *Phyfe v. Wardwell*, 5 Paige, 268; *Anderson v. Lemon*, 8 N. Y. 236

<sup>3</sup> *Jones v. Powell*, 4 Beav. 96.

<sup>4</sup> *Keech v. Sandford*, Sel. Cas. Ch. 61; 1 Lead. Cas. Eq. 36, notes; *Holt v. Holt*, 1 Cas. Ch. 190; *Fitzgibbon v. Scanlan*, 1 Dow. P. C. 269; *James v. Dean*, 11 Ves. 392; 15 Ves. 236; *Parker v. Brooke*, 9 Ves. 583; *Rowe v. Chichester*, Amb. 719; *Killick v. Flexney*, 4 Bro. Ch. 161; *Griffin v. Griffin*, 1 Sch. & Lef. 352; *Holdridge v. Gillespie*, 2 Johns. Ch. 33; *McClanahan v. Henderson*, 2 A. K. Marsh. 388; *Galbraith v. Elder*, 8 Watts, 81; *Heager's Ex'rs*, 15 Serg. & R. 65; *Fisk v. Sarber*, 6 Watts & S. 18.

<sup>5</sup> *Nesbitt v. Tredennick*, 1 B. & B. 29; *James v. Dean*, 11 Ves. 396.

(a) The rule that a renewal of applies also to a purchase of the leaseholds by a tenant for life enures reversion. *Phillips v. Phillips*, 29 to the benefit of the remainder-men, Ch. D. 673.

such persons, if they obtain the renewal of a lease, hold it for the benefit of those interested with them in the estate.<sup>1</sup> The parties, however, who undertake to enforce this trust, must do equity by repaying their proportion of the expenses incurred in the renewal.<sup>2</sup>

<sup>1</sup> *Palmer v. Young*, 1 Vern. 276; *Pickering v. Bowles*, 1 Bro. Ch. 197; *Fitzgerald v. Raynsford*, 1 B. & B. 37, n.; *Giddings v. Giddings*, 3 Russ. 241; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Rowe v. Chichester*, Amb. 715; *Eyre v. Dolphin*, 2 B. & B. 290; *Foster v. Marriott*, Amb. 658; *Tanner v. Elworthy*, 4 Beav. 487; *Randall v. Russell*, 3 Mer. 196; *Vanhorn v. Fonda*, 5 Johns. Ch. 388; *Smiley v. Dixon*, 1 Pa. 439.

<sup>2</sup> *Randall v. Russell*, 3 Mer. 196; *James v. Dean*, 11 Ves. 396; *Miller v. Stanley*, 2 De G., J. & S. 185.

## CHAPTER XVIII.

### POWERS AND DUTIES OF TRUSTEES AS BETWEEN TENANT FOR LIFE AND REMAINDER-MAN.

- § 539. Trustee must act impartially between tenant for life and remainder-man.
- § 540. When tenant for life is entitled to the possession.
- § 541. Where the trust fund is personal property.
- § 542. In what place personal property may be used.
- § 543. Trustee must have possession of stocks and similar securities.  
Power of attorney to tenant for life.
- §§ 544, 545. As to extra-cash dividends and stock dividends by corporations.
- § 546. As to the increase of stock upon a farm or plantation, partnership, profits, &c.
- § 547. Of property that perishes or is consumed in the use, or decreases in value.
- § 548. Rights of tenant for life under an absolute direction for conversion.
- § 549. Reversionary interests must be sold for benefit of tenant for life.
- § 550. As to the right of tenant for life to income during the first year, — and after the first year.
- § 551. Various rules upon the same subject.
- § 552. As to repairs by tenant for life.
- § 553. As to insurance.
- § 554. As to taxes, rates, and incumbrances.
- § 555. Where tenant for life becomes bankrupt.
- § 556. As to the apportionment of rent, income, dividends, and annuities.

§ 539. WHERE property is settled upon a trustee to hold in trust for one person for life, and the remainder over for some other person or persons, it is the duty of the trustee to consult the interest of both the tenant for life and the remainder-man. The trustee must act impartially, and not give either an advantage at the expense, or to the prejudice, of the other.<sup>1</sup> The principal of the trust fund must not be con-

<sup>1</sup> *Mortlock v. Buller*, 10 Ves. 308; *Cowgill v. Oxmantown*, 3 Y. & C. 369; *Watts v. Girdlestone*, 6 Beav. 188; *Langston v. Ollivant*, Coop. 33; *Stuart v. Stuart*, 3 Beav. 430; *Pechel v. Fowler*, 2 Anst. 550; *Mahon v. Stanhope*, cited 2 Sugd. Pow. 512; *Marshall v. Sladden*, 4 De G. & Sm. 468; *Moseley v. Marshall*, 22 N. Y. 200; *McNeil v. McDonald*, 22 Ark. 477.

verted to the use of the life *cestui*.<sup>1</sup> A court of equity can correct any mismanagement between the trustee and either the tenant for life or the remainder-man; it has even set aside a decree obtained by collusion between the trustee and tenant for life.<sup>2</sup> The court will not allow property to be sold if the interests of remainder-men, known or unknown, would be thereby imperilled.<sup>3</sup> And when the remainder takes effect, equity will compel the trustee to fulfill his last duty to the remainder-men by turning over the property to them.<sup>4</sup>

§ 540. The right of the tenant for life to the possession has already been stated.<sup>5</sup> Where property is devised specifically, and the right of the trustees to convert it is excluded, and the tenant for life can have no beneficial enjoyment without possession, the trustees must allow him such possession.<sup>6</sup> As was before said, if the title of the tenant for life is a legal and not an equitable title, he is, of course, entitled to the possession;<sup>7</sup> but the tenant for life is, in such case, an implied or *quasi* trustee for the remainder-man, and a court of equity can enjoin him from injuring the inheritance.<sup>8</sup> (a) But

<sup>1</sup> Woodburn v. Woodburn, 23 Ill. App. 289; Mitchell v. Colburn, 61 Md. 244.

<sup>2</sup> Wright v. Miller, 4 Seld. 9; Clerke v. Devereux, 1 S. C. 172; Cunningham v. Schley, 41 Ga. 476.

<sup>3</sup> Dunham v. Milhous, 70 Ala. 606.

<sup>4</sup> Haddock v. Perham, 70 Ga. 576.

<sup>5</sup> *Ante*, § 329.

<sup>6</sup> Tidd v. Lister, 5 Madd. 432; 10 B. Mon. 290.

<sup>7</sup> *Ante*, § 328; Moseley v. Marshall, 22 N. Y. 200.

<sup>8</sup> Joyce v. Gunnels, 2 Rich. Eq. 259; Horrey v. Glover, 2 Hill, Ch. 515;

(a) Even when the legal title is given for life to a widow by her husband's will, with full possession and power to use, dispose of, and consume the estate for her life-support, a duty rests upon her, in the nature of a trust, to have due regard to the rights of the remainder-men, and not to recklessly squander or give away the estate, and such trust is enforceable against purchasers with knowledge of the trust. Johnson v. Johnson (Ohio), 38 N. E. Rep. 61. See Cox v. Wills, 49 N. J. Eq. 130, 573; Hardy v. Sanborn, 172 Mass. 405; Nunn v. O'Brien, 83 Md. 198; Hill v. Page (Tenn.), 36 S. W. 735; *supra*, § 511 a, n. (a).



if the title is equitable merely, the trustees must see that the equitable tenant for life does not commit waste of any kind;<sup>1</sup> and if he is tenant without impeachment for waste, the trustees must see that the estate is not materially lessened in value by the use made of it.<sup>2</sup> But the trustees cannot compel the tenant for life to repair; and neither the court nor the trustees can interfere with the possession on such grounds.<sup>3</sup> It has been held, however, in the United States, that the tenant for life is obliged to keep the buildings in which he lives from going to decay, by using ordinary care, but that he is not obliged to expend any extraordinary sums.<sup>4</sup> Although the rules as to waste are the same in this country and in England, yet it has been said that there should be a different application of them here, on account of the difference of circumstances, and that tenants for life are encouraged to open mines and cut timber, for the reason that such acts are rather improvements than waste, in America.<sup>5</sup> This may be true in some parts of the country, where it is important to clear the land and develop its resources, but it is not true in the older States.

§ 541. Where the tenant for life is entitled to the beneficial use of movable articles, heirlooms, furniture, plate, pictures, and similar things, the trustees must take in the

*Clarke v. Saxon*, 1 id. 69; *Shibley v. Ely*, 2 Halst. Ch. 181; *Wilson v. Edmonds*, 4 Fost. 545; *Broom v. Curry*, 19 Ala. 805.

<sup>1</sup> *Tidd v. Lister*, 5 Madd. 432; *Freeman v. Cook*, 6 Ired. Eq. 376; *Woodman v. Good*, 6 Watts & S. 169.

<sup>2</sup> *Waldo v. Waldo*, 7 Sim. 261; *Leeds v. Amherst*, 14 Sim. 357; 2 Phill. 117; *Burge v. Lambe*, 16 Ves. 174; *Marker v. Marker*, 9 Hare, 1; 4 Eng. L. & Eq. 95; *Newdigate v. Newdigate*, 1 Sim. 131; *Wykham v. Wykham*, 19 Ves. 14; *Smythe v. Smythe*, 2 Swanst. 251; *Morris v. Morris*, 15 Sim. 510; *Brydges v. Brydges*, 2 Sim. 150; *Davies v. Lee*, 6 Ves. 786; *Chamberlain v. Dummer*, 3 Bro. Ch. 549; *Woodman v. Good*, 6 Watts & S. 169; *Briggs v. Oxford*, 19 Jur. 817; 1 De G., M. & G. 363; *Whitfield v. Burnett*, 2 P. Wms. 242.

<sup>3</sup> *Powis v. Blagrove*, 1 Kay, 495; 4 De G., M. & G. 448; *Gregg v. Coates*, 23 Beav. 33.

<sup>4</sup> *Wilson v. Edmonds*, 11 Fost. 545.

<sup>5</sup> *Williams on Real Prop.*, 23, n.; *Lynn's App.*, 31 Penn. St. 44.

first instance a schedule of the articles delivered to such tenant for life signed by him;<sup>1</sup> but if there is any danger that the articles will be wasted, secreted, or carried away, security may be insisted upon and the trustees or the *cestui que trust* in remainder may apply to the court for an injunction, and a decree that the tenant for life be required to give proper security for their safety.<sup>2</sup> But where trustees under a will were directed to hold property for a certain term, and then to pay it over to persons named, to be held by them during their own lives, security cannot be required from the tenants for life for its preservation for the remainder-men, if no such security is required by the terms of the will.<sup>3</sup> In Pennsylvania, there is special legislation authorizing the executor to take security.<sup>4</sup> In case of a legacy for life of money or stocks, the tenant for life cannot have possession

<sup>1</sup> *Leeke v. Bennett*, 1 Atk. 471; *Bill v. Kynaston*, 2 Atk. 82; *Cheshire v. Cheshire*, 2 Ired. Eq. 590; *Westcott v. Cady*, 5 Johns. Ch. 334; *Henderson v. Vaulx*, 10 Yerg. 30; *Covenhoven v. Shuler*, 2 Paige, 122; *De Peyster v. Clendining*, 8 Paige, 295; *Spear v. Tinkham*, 2 Barb. Ch. 211; *Emmons v. Cairnes*, 3 Barb. 243; *Langworthy v. Chadwick*, 13 Conn. 42; *Hudson v. Wadsworth*, 8 Conn. 363; *Nance v. Coxe*, 16 Ala. 125; *Mortimer v. Moffatt*, 4 Hen. & Munf. 503; *Slanning v. Style*, 3 P. Wms. 336.

<sup>2</sup> *Woodman v. Good*, 6 Watts & S. 169; *Swann v. Ligan*, 1 McCord, Ch. 227; *Henderson v. Vaulx*, 10 Yerg. 30; *Covenhoven v. Shuler*, 2 Paige, 122; *Braswell v. Morehead*, 1 Busb. Eq. 26; *Lippincott v. Warder*, 14 Serg. & R. 118; *Ramey v. Green*, 18 Ala. 771; *Kinnard v. Kinnard*, 5 Watts, 108; *Westcott v. Cady*, 5 Johns. Ch. 334; *Langworthy v. Chadwick*, 13 Conn. 42; *Bill v. Kynaston*, 2 Atk. 82; *Frazer v. Beville*, 11 Grat. 9; *Foley v. Burnell*, 1 Bro. Ch. 279; *Hudson v. Wadsworth*, 8 Conn. 363; *Holliday v. Coleman*, 2 Munf. 162; *Mortimer v. Moffatt*, 4 Hen. & Munf. 503; *Chisholm v. Starke*, 3 Call, 25; *McLemore v. Good*, 1 Harp. Eq. 272; *Cheshire v. Cheshire*, 2 Ired. Eq. 569; *Sutton v. Cradock*, 1 id. 134; *Howell v. Howell*, 3 Ired. Eq. 522; *Clarke v. Saxon*, 1 Hill, Ch. 75; *Condy v. Adrian*, id. 154; *Spear v. Tinkham*, 2 Barb. Ch. 211. A purchaser from the tenant for life may be compelled to give security. *Pringle v. Allen*, 1 Hill, Ch. 135; *Cordes v. Adrian*, id. 154; *Howe v. Dartmouth*, 2 Lead. Cas. Eq. 262.

<sup>3</sup> *Waldo v. Cummings*, 43 Ill. 421.

<sup>4</sup> Act, 1834; *Dunlop*, 528; *Rodgers v. Rodgers*, 7 Watts, 19; *Lippincott v. Warder*, 14 Serg. & R. 118; and *Kinnard v. Kinnard*, 5 Watts, 108, were decided before this legislation.

of them without giving security for the protection of the remainder-man.<sup>1</sup> But the right of possession by the tenant for life, even in such a case, may depend upon the terms of the will.<sup>2</sup> When the trustee holds funds and there is no evidence that part of it is income, it is presumed to be capital.<sup>3</sup> (a)

§ 542. Personal chattels, like furniture and other articles, may be used by the tenant for life, if he is entitled to the possession in any house or place; or he may let them out for hire,<sup>4</sup> but he cannot pawn or sell them beyond the extent of his interest;<sup>5</sup> but articles in a house, in the nature of heir-looms, are annexed to the house, and go with it, therefore they cannot be removed.<sup>6</sup>

§ 543. Where the trust property consists of stocks and other personal securities, the trustee must retain possession for the benefit of the remainder-man; but he may put the

<sup>1</sup> *Patterson v. Devlin*, 1 McMul. Eq. 459; *Freeman v. Cooke*, 6 Ired. 679; *Eichelberger v. Barnitz*, 17 Serg. & R. 293; *Rodgers v. Rodgers*, 7 Watts, 19; *Kinnard v. Kinnard*, 5 Watts, 108.

<sup>2</sup> *De Graffenreid v. Green*, 1 Cold. 109.

<sup>3</sup> *Pierce v. Burroughs*, 58 N. H. 302.

<sup>4</sup> *Marshall v. Blew*, 2 Atk. 217.

<sup>5</sup> *Hoare v. Parker*, 2 T. R. 376.

<sup>6</sup> *Cadogan v. Kennett*, Cowp. 432.

(a) A trust for the maintenance of certain persons out of the income of a fund may be a distant and separate trust from a trust of the capital of the fund, created by the same instrument for the same persons on their attaining a certain age. *In re Wise*, [1896] 1 Ch. 281. An unrestricted power to appoint income applies also to the capital. *In re L'Herminier*, [1894] 1 Ch. 675. "The rule that the gift of the income of property is a gift of the property itself, only applies when there is no limitation of time attached to the gift. A gift of income followed by a gift over of the *corpus* on the happening of a contingency, or on the death of a beneficiary, by necessary construction and without express words, is a gift of the income for the intermediate period only." *Per* Andrews, J., in *Re Smith*, 131 N. Y. 239, 246. See also *Locke v. Farmers' L. & T. Co.*, 140 N. Y. 135; *In re Hoyt*, 50 N. Y. S. 623; *Johnson v. Johnson*, 92 Tenn. 559.

tenant for life in possession of the dividends, interest, or income, by giving him a power of attorney to collect them as they become due. The power should be restricted to the collection of the income; for if he gave the tenant for life power to sell the securities, he would commit a breach of trust. Nor should it be used after the death of the tenant for life; for the trustee would be responsible to the remainderman for all income received by the representatives of the tenant, accruing after his death. Care must be taken by the trustee, after giving the power, himself not to receive the dividends; for that would be a revocation of the power, and a new one would be necessary. So the death of the trustee, or of one of several trustees, would be a revocation.<sup>1</sup> If, at any time, the tenant for life obtains more than belongs to him, the trustee may withhold, or recoup from, subsequent income.<sup>2</sup>

§ 544. Considerable difference of opinion and practice has existed respecting the rights of the tenant for life, and of the remainderman, to extraordinary dividends or bonuses from corporations. The early English rule held that *extra* dividends paid in cash, and *a fortiori* if they were declared or paid in capital stock, went to the capital of the trust fund, and were held by the trustee for the remainderman; and that the income only from such extra dividends belonged to the tenant for life.<sup>3</sup> This rule, applied to extra-cash dividends from the earnings of the capital stock of corporations, worked a great hardship upon the tenant for life, and it is unreasonable. In *Barclay v. Wainwright*, Lord Eldon first threw a doubt over the cases, by decreeing an increased or extra dividend to the tenant for life.<sup>4</sup> It was afterwards said, that wherever the increased dividend was made clearly and

<sup>1</sup> *Sadler v. Lee*, 6 Beav. 324; *Hill on Trustees*, 386; *Lewin*, 485.

<sup>2</sup> *Williams v. Allen*, 32 Beav. 650; *Barratt v. Wyatt*, 30 Beav. 442.

<sup>3</sup> *Brander v. Brander*, 4 Ves. 801; *Paris v. Paris*, 10 Ves. 184; *Witts v. Steele*, 13 Ves. 363; *Clayton v. Gresham*, 10 Ves. 288; *Hooper v. Rositer*, 13 Price, 774; 1 *McClell.* 527; *Preston v. Melville*, 16 Sim. 163.

<sup>4</sup> *Barclay v. Wainwright*, 14 Ves. 66; *Norris v. Harrison*, 2 Madd. 279.

distinctly as a dividend only, the tenant for life should have it; but where it was not clearly given as a dividend, it was considered as an accretion to the capital, and went to the remainder-man.<sup>1</sup> Thus cash dividends, extra dividends, or bonuses declared from the earnings of corporations, are now held to be income and to belong to the tenant for life.<sup>2</sup> So also dividends and bonuses earned before the testator's death, but declared afterwards, are held to be income and to belong to the tenant for life.<sup>3</sup> But the enhanced price for which stocks sell, by reason of dividends earned, but not declared, belongs to the remainder-man and not to the tenant for life.<sup>4</sup> Where a tenant for life is entitled to the income, a year or more after the testator's death having expired, and stocks are sold before the day of the dividend, in order to complete a purchase of land which was directed by the will, the tenant for life is entitled to compensation for the loss of his income.<sup>5</sup> So if, under a gift in a will to an executor of so much stock or other property as will produce \$2,000 per year, which is to be paid over to a tenant for life, property is set apart in good faith, with the consent of all parties, sufficient to produce \$2,000, and afterwards the property produces much more, and there is no provision in the will for such a contingency, the tenant for life will be entitled to the whole income, and may maintain a bill in equity for it.<sup>6</sup>

§ 545. Another question has lately arisen, upon which there is much diversity of opinion and practice. The question is, to whom stock dividends, so called, belong. Are they income, and belong to the tenant for life; or capital,

<sup>1</sup> *Hooper v. Rossiter*, 1 McClell. 527.

<sup>2</sup> *Price v. Anderson*, 15 Sim. 473; *Bates v. Mackinlay*, 31 Beav. 280; *Johnson v. Johnson*, 15 Jur. 714; 5 Eng. L. & Eq. 164; *Murray v. Glasse*, 17 Jur. 816; *Cuming v. Boswell*, 2 Jur. (N. S.) 1005; *Clive v. Clive*, Kay, 600; *Plumbe v. Neild*, 6 Jur. (N. S.) 529; *Wright v. Tucket*, 1 Johns. & H. 266; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Ware v. McCandlish*, 10 Leigh, 595; *Read v. Head*, 6 Allen, 174.

<sup>3</sup> *Bates v. Mackinlay*, 31 Beav. 280.

<sup>4</sup> *Scholfield v. Refern*, 32 L. J. Ch. 627.

<sup>5</sup> *Londesborough v. Somerville*, 19 Beav. 295.

<sup>6</sup> *Russell v. Loring*, 3 Allen, 126.

and belong to the remainder-man? By the early English rule, they went with all extra-cash dividends of *bonuses* to the remainder-man.<sup>1</sup> This rule has been so far changed, that dividends in money which come from the earnings of the capital invested belong to the tenant for life.<sup>2</sup> But this question has arisen where a corporation has capitalized a part of its earnings, by using them to enlarge its property, or to improve its value. In such cases, corporations sometimes vote to issue and apportion among their stockholders new certificates of stock, which certificates (in whole or in part) represent the amount of earnings that have been capitalized, as some of the books call it. On one side of this question, it is urged that nothing is income from the stock of a corporation until the corporation itself has set it apart as income, and declared it to be payable in money as a dividend; that a corporation may in good faith determine whether it will declare a dividend or not, and it may also declare whether any part of its earnings shall be turned into capital or not; that if a corporation in good faith uses a part of its earnings in enlarging and improving its works, and thereby increases the value of its stocks, such increased value belongs to the remainder-man; that it is immaterial whether a corporation allows the old shares to stand at this increased value, or whether it issues new certificates of shares to represent this new and increased value of its capital stock; that nothing is a dividend, in the legal sense of the word, which is not a division of money from what the corporation has determined to be income; that if a corpora-

<sup>1</sup> *Brander v. Brander*, 4 Ves. 800; *Paris v. Paris*, 10 Ves. 185; *Witts v. Steele*, 13 Ves. 363; *Clayton v. Gresham*, 10 Ves. 288; *Hooper v. Rossiter*, 13 Price, 774; 1 McClel. 527; *Preston v. Melville*, 16 Sim. 163.

<sup>2</sup> *Barclay v. Wainwright*, 14 Ves. 66; *Norris v. Harrison*, 2 Madd. 279; *Hooper v. Rossiter*, 1 McClel. 527; *Price v. Anderson*, 15 Sim. 473; *Bates v. Mackinlay*, 31 Beav. 280; *Johnson v. Johnson*, 5 Eng. L. & Eq. 164; 15 Jur. 714; *Murray v. Glasse*, 17 Jur. 816; *Cuming v. Boswell*, 2 Jur. (N. S.) 1005; *Clive v. Clive*, Kay, 600; *Plumbe v. Neild*, 6 Jur. (N. S.) 529; *Wright v. Tucket*, 1 John. & H. 266; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Ware v. McCandlish*, 11 Leigh, 595; *Lord v. Brooks*, 52 N. H. 77.

tion determines to apply a certain sum of money in its hands to purposes for which capital is usually applied, and to issue new certificates of stock to its shareholders, in the proportion of their number of shares, to represent such sum, it is in no legal sense a dividend, but an apportionment of capital, and although such proceedings are in popular language and in corporate votes often called stock dividends, they are not dividends in law, but are accretions to the capital, and go to the remainder-man. It is further urged, in illustration, that if the trust fund is invested in land, and the land rises in value from its situation, or from the use and necessary improvements made by the tenant for life, such increased value becomes capital and belongs to the remainder-man. Chief-Baron Alexander, Vice-Chancellor Wood, now the Lord Chancellor, and the Supreme Court of Massachusetts, have adopted this view, and have determined that such appropriations of earnings and the new certificates of stock, representing additions to the capital stock, whether declared under the name of stocks, dividends, or however appointed or apportioned by the corporation or its directors, are capital, and belong to the remainder-man.<sup>1</sup> The rule laid down in these several cases seems to be this, that where the apportionment of shares, or stock dividend, so called, creates new capital, in addition to that already existing, thereby enlarging and increasing the value of the property, whether it comes from earnings or from other sources, as from rise in value, it belongs to the remainder-man; while all dividends paid in cash or otherwise, not in addition to or in diminution of the capital, go to the tenant for life. These courts, observing this general distinction, range all cases under one or the other head, without so much regard to the name given to the dividend as to the actual character of the transaction. (a) Thus, *In re Barton's Trust*, and in *Minot v.*

<sup>1</sup> *Hooper v. Rossiter*, 1 McClel. 527; *In re Barton's Trust*, L. R. 5 Eq. 238; *Minot v. Paine*, 99 Mass. 101; *Balch v. Hallett*, 10 Gray, 408.

(a) In *McLouth v. Hunt*, 154 N. Y. 179, 198, the court refused to accept this view, holding the material thing to be the real nature and substance of the transaction, and saying: "The mere adoption by the

Paine,<sup>1</sup> where the earnings were not divided as cash, but were expended on the property, the capital increased, and a stock dividend declared, it was held to go to the remainder-man; while in *Leland v. Hayden*,<sup>2</sup> the corporation having purchased its own stock with its earnings, and then divided it among its stockholders, it was held that it went to the tenant for life, it not being an accretion to the capital. But in *Daland v. Williams*, the court, looking to the substance of the transaction, held that, although the dividend was declared in stock or cash at the option of the stockholder, yet if he, being a trustee, elected to take the stock, and it was for the interest of the estate that he should, and all the parties so agreed, it then belonged to the remainder-man and not to the tenant for life.<sup>3</sup> On the other hand, it has been claimed in behalf of the tenant for life, that, as nothing

<sup>1</sup> *Hooper v. Rossiter*, 1 McClel. 527; *In re Barton's Trust*, L. R. 5 Eq. 238; *Minot v. Paine*, 99 Mass. 101; *Balch v. Hallett*, 10 Gray, 408.

<sup>2</sup> *Leland v. Hayden*, 102 Mass. 550.

<sup>3</sup> *Daland v. Williams*, 101 Mass. 571.

corporation of a resolution cannot change accumulated earnings into capital, as between the life-tenant and remainder-men." The court, unfortunately, here refers (at p. 197) to *Sproule v. Bouch*, 29 Ch. D. 635, as representing the English rule; but that decision was reversed in *Bouch v. Sproule*, 12 A. C. 385, where it was held that the real nature of the transaction in that case was that the corporation did not pay or intend to pay any amount as a dividend, but appropriated the undivided profits as an increase of the capital stock, and that the new shares, or bonus dividends, were capital of the trust estate. See *In re Northage*, 60 L. J. Ch. 488; *In re Alsbury*, 45 Ch. D. 237; *Gibbons v. Mahon*, 136 U. S. 549; *Davis v. Jackson*, 152 Mass. 58; *Mills v. Britton*, 64 Conn. 4; *Greene v. Smith*, 17 R. I. 28; *Slocum v. Ames*, 19 R. I. 401; 19 Am. Law Rev. 571, 737; 26 id. 1; 36 Cent. L. J. 452.

The following recent cases also hold that stock dividends represent income, and belong to the tenant for life: *Thomas v. Gregg*, 78 Md. 545; *Pritchitt v. Nashville Trust Co.*, 96 Tenn. 472; *Ilite v. Hite*, 93 Ky. 257.

As to apportioning losses between tenants for life and remainder-men, see *Hagan v. Platt*, 48 N. J. Eq. 206; *In re Tuttle* (N. J.), 24 Atl. 1; *In re Hoyt*, 50 N. Y. S. 623; *Meldon v. Devlin*, 53 id. 172; *In re New York Life Ins. Co.*, id. 382; *Cornell's Estate*, 41 id. 539; *Whitridge v. Williams*, 71 Md. 105.



but profits can be divided, all dividends declared, whether in stock or cash, being the produce, proceeds, or result of the property, belong to the tenant for life. Cases involving this question have been decided in several States, contrary to the decisions in Massachusetts and the courts in England; and it has been decreed that stock dividends, in whole or in part, belong to the tenant for life, and not to the remainder-man. In Pennsylvania, it was held that all accumulations in stock, after the death of a testator, are as much a part of the income of the principal as current dividends, and as such belong to the tenant for life; and that no action whatever of the corporation could deprive the tenant for life of them and give them to the remainder-man; that the value of stock held by the testator at the time of his death is the capital of the trust, and must remain subject to the trusts in the will; that all income of such capital, whether in the form of other certificates or not, must be regarded as income.<sup>1</sup> While in

<sup>1</sup> Earp's App., 28 Penn. St. 368. The question stated at length in this section is important to tenants for life and to remainder-men; and from the character of the decisions in the various States, and from the great number of States in which no decision has yet been had, it may be considered an open question, at least in a great majority of the States. In only two States have there been decisions in the courts of last resort, and in those States the decisions are quite different, not to say antagonistic. There is no doubt of the doctrine in England. Beginning with the rule, that all extra dividends or "bonuses," even if paid in cash, should go to the remainder-man [see cases before cited], it gradually came about that all such dividends made as "dividends" from the earnings, produce, proceeds, interest, or income of the corporation, should be considered income, and should belong to the tenant for life. But while such was the rule in regard to all dividends, made as dividends, it became equally well settled that all appropriations from the earnings made to the capital, or stock dividends, as they are sometimes called, belong to the remainder-man. Thus in *Hooper v. Rossiter*, 1 McClel. 536, (1824) Ch. Baron Alexander said: "All the cases proceed upon the same principle. It seems from all of them, from the first to the last, that wherever the addition was made clearly and distinctly, as dividend only, the tenant for life was to have it; but wherever it was not clearly given as a dividend, it was considered as an accretion of capital, divisible among the proprietors. I have looked into all the cases with great care, and that seems to be the result of them. Whether the testator makes use of the expression, 'divi-

New York and New Jersey, masters were appointed to inquire and determine how much of the stock divided was capi-

dends,' or 'dividends and profits,' or 'dividends, interest, and profits,' or (as in this case) 'interest, dividends, profits, and proceeds,' I look upon all of them to come to the same thing, and that this is too nice a circumstance to found any distinction on. This disposes of the claim of the plaintiff, as tenant for life." And see *Maclaren v. Stainton*, 3 De G., F. & J. 202; *Kinmouth v. Brigham*, 5 Allen, 270. Again, in 1868, *In re Barton's Trusts*, L. R. 5 Eq. 244, Vice-Chancellor Wood, in answer to the argument and the observation of Lord Eldon, that the corporation has the power to give the property to the tenant for life, or to the remainder-man, said: "The dividend to which the tenant is entitled is the dividend which the company chooses to declare. And when the company meet and say, that they will not declare a dividend, but will carry over some portion of the half-year's earnings to the capital account, and turn it into capital, it is competent for them to do so; and when this is done everybody is bound by it, and the tenant for life of those shares cannot complain. . . . If a man has his shares placed in settlement, he gives his trustees, in whose names they stand, a power of voting, and he must use his influence to get them to vote as he wishes. But where the company, by a majority of their votes, have said, that they 'will not divide' this money, but turn it into capital, capital it must be from that time. I think that is the true principle." The meaning of this is, that where a corporation votes "not to divide" its earnings, but to turn it into capital, it becomes capital to the corporation, and that what is capital to the corporation must be capital to its shareholders; and although the corporation may vote that such increased capital shall be apportioned or divided among its shareholders *pro rata*, it is not a "dividend" of "profits," or "interest," or "income," or "proceeds," or "produce," within the meaning of the testator in his will, or within the meaning of the law. The same principle was reiterated by V. C. Malins, in December, 1870, in *Ricketts v. Harling*. *Weekly Notes*, Dec. 17, 1870, p. 260. The Supreme Court of Massachusetts, in *Minot v. Paine*, 99 Mass. 101, probably intended to establish this general doctrine; but the opinion went somewhat further, and laid down a rule which is not properly guarded, and as a rule it has been modified or abandoned in the later decisions. The rule, as stated, is "to regard cash dividends, however large, as income, and stock dividends, however made, as capital." In *Vinton's App.*, 99 Penn. St. 434, this doctrine of the Massachusetts courts is repudiated, a cash dividend being held in the Pennsylvania case to belong to the capital. In *Simpson v. Moore*, 30 Barb. 637, there was a cash dividend of eighteen per cent., which embraced a part of the capital of the corporation, it being a bank in process of liquidating and winding up its affairs. This manner of declaring a dividend would not prejudice where the same person was entitled to the whole

tal, or made to represent an increase in the value of the property, and how much came from income or earnings, and

sum beneficially; but where a tenant for life was entitled to the income, and a remainder-man was entitled to have the capital reinvested, it became necessary, of course, to determine the proportions belonging to each. And so in *Leland v. Hayden*, 102 Mass. 550, where a dividend was made of the stock of the corporation, which stock had been bought an by the corporation itself with its earnings, and the dividend so made did not represent any increase of the capital stock, the court decreed it to be income and to belong to the tenant for life. If the court had been content to reaffirm the principle of the later English cases, such as *Hooper v. Rossiter*, and *In re Barton's Trusts*, and had not laid down the rule as quoted above from *Minot v. Paine*, it would have saved some misapprehension. This rule, in the broad terms in which it is stated, has been thus modified in *Leland v. Hayden*, and the rule as stated in the text seems to be the result of the Massachusetts decisions on this subject.

Earp's App., 28 Penn. St. 368, is a leading case against the authority of the English and Massachusetts cases. In that case a testator had 541 shares of stock in a corporation, the par value of which was \$50, but which at the time of his death, in 1848, were worth \$125 per share. The shares went on increasing in value, in addition to regular dividends, so that, in 1854, the corporation called in the old certificates, and issued certificates for 1350 shares of the value of \$80 per share, in place of the 541 held by the testator at his death. Or, by another mode of calculating, the shares were worth \$67,500 at the time of the testator's death, and \$108,000 in 1854. The question arose whether this increase of \$40,500 belonged to the tenants for life or the remainder-men. The action of the corporation, in making this change of certificates, does not very clearly appear; nor does it very clearly appear whether the increased value was wholly from accumulation of profits, or whether any part of it was from the rise of the value of the property. Perhaps this is not material, from the view taken by the court. Chief Justice Lewis in the opinion says: "It is equally clear, that the profits, arising since the death of the testator, are 'income' within the meaning of the will, and should be distributed among the appellants (tenants for life). The profits amounted at the time of the issue of new certificates of stock, to the sum of \$40,500, exclusive of the current semi-annual dividends which have been previously declared and paid. That sum is the rightful property of the appellants. The managers might withhold the distribution of it for a time, for reasons beneficial to the interests of the parties entitled. But they could not, by any form of procedure whatever, deprive the owners of it, and give it to others not entitled. The omission to distribute it semi-annually, as it accumulated, makes no change in its ownership. The distribution of it among the stockholders, in the form of new certificates, has no effect whatever upon the equitable

also how much of the stock dividend was made up of accumulations of earnings before, and how much from earnings

right to it. It makes no kind of difference whether this fund is secured by 541 or by 1350 certificates. Its character cannot be changed by the evidence given to secure it. Part of it is 'principal,' the rest is 'income' within the meaning of the will. The principal must remain unimpaired during the lives of the appellants, and the 'income' arising since the death of the testator is to be distributed among them. Standing upon principle, and upon the intent of the testator plainly expressed in his will, we have no difficulty whatever in making this disposition of the fund." In regard to this case, it may be said that it goes too far. It cannot be sustained in all its broad assertions, whether they are necessary for the decision of the case or not. For instance, it has never been supposed that a stockholder in a corporation had any ownership in the earnings of a corporation before the corporation itself had set apart a sum as earnings, and declared and divided it as a dividend. *Crawford v. North Eastern Railw.*, 3 K. & J. 744; *Williston v. Michigan, &c. Railw.*, 13 Allen, 400. If, therefore, a corporation, acting in good faith, uses its earnings in improving its property, and neglects to apportion or divide them, how can a tenant for life enforce his ownership? Can a court of equity compel a corporation, acting in good faith, to declare a dividend? Further, it has generally been supposed, that if a corporation does not declare a dividend, and the value of the stock increases from the use of the earnings, as capital in its business, or if the value of its stock rises from any reason, and the stock is sold by the trustee for an enhanced price, all the increased value over the original appraised value belongs to the trust fund, and the income thereof only goes to the tenant for life, and the fund to the remainder-men. But if this is not so, and the increased value of the stock goes to the tenant for life, as held by Chief Justice Lewis, is the converse of his proposition true; and if stock sells for less than its appraised value at the time of the institution of the trust, can the trustee withhold dividends or income from the tenant for life until the original appraised value is made good? The authority of a corporation to apply any part of its earnings to the permanent improvement of its property, and thus to deprive the tenant for life of his share of the income or earnings of the corporation, is denied in this case, at least so far as the rights of a tenant for life are concerned. In short, the proposition or assertion of this case, that the earnings are the rightful property of the tenant for life, and that no action of the corporation can alter his rights to them, cannot be sustained in practice, for the simple reason that nothing belongs to the stockholder until a dividend is made; and, until a dividend is made, the tenant for life has no rights or ownership to be altered or affected by the action of the corporation. *Coleman v. Columbia Oil Co.*, 51 Penn. St. 74; *Granger v. Bassett*, 98 Mass. 462; *March v. Eastern R. R. Co.*, 43 N. H. 515; *Crawford v. North East-*

after, the investment.<sup>1</sup> Where new certificates of stock are issued to one who already holds shares as trustee, if the new  
ern Railw. 3 K. & J. 744. But see *Johnson v. Bridgewater Co.*, 14 Gray, 274; *Taft v. Providence, &c. Railw.*, 8 R. I. 310; *McLaughlin v. Detroit, &c.* 8 Mich. 100; *Williston v. Michigan, &c.*, 13 Allen, 400; *Foot's App.*, 22 Pick. 299. It was said by Lord Eldon, that the corporation has it in its power to give the benefit to the tenant for life or not; and this he said, not as a proposition of law, but as a statement of the practice of the courts. The corporation cannot alter any of the rights of the tenant for life, nor can it invest any of his money in a manner not agreeable to him, for the simple reason that until the corporation has declared the dividend, the tenant for life has no rights to be altered, and no money to be invested. It is only after the corporation has made a dividend, and the trustee has it in hand, that the tenant for life has any right, or is in any position to claim anything. The corporation must deal with its stockholders as absolute owners. If, therefore, the corporation has a right to turn any part of its "income" into capital, as against the absolute owner, who has not only the life-interest, but the whole interest in himself, it must have the same right as against the trustee, who, so far as the corporation is concerned, is the absolute owner of the stocks. The corporation, then, would seem to have the right, acting in good faith, to apply its income as capital to its business, especially if the corporation itself, or its directors, acting within the scope of their authority, vote to do so. If the corporation votes to do so, and thus increases the value of the shares in the hands of the trustees, but creates no new shares, can the tenant for life call for this increased value? If he can, and the case in Pennsylvania seems so to decide, a new principle will be established in the government of corporations and in the administration of trusts. It is apparent from these observations, that the opinion in the case of *Earp's Appeal* cannot be carried to the logical conclusions to which it leads. It is proper to say, however, that the nature of the acts by the corporation does not very clearly appear. Whether the corporation intended to make a stock dividend or not, or whether the accumulations were used in the legitimate business of the corporation as capital, or whether it remained accumulated income not divided, and not applied to capital, does not certainly appear; perhaps for the reason that the court treats such considerations as immaterial. In New York, the case of *Simpson v. Moore*, 31 Barb. 638, has little to do with the question, for the reason that the cash dividend made in that case was partly composed of earnings, and partly of capital of a corporation that was winding up its affairs. But the case of *Clarkson v. Clarkson*, 18 Barb. 646, is a direct decision upon the point, that, if a corporation makes a stock dividend from its gains, profits, in-

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<sup>1</sup> *Clarkson v. Clarkson*, 18 Barb. 646; *Simpson v. Moore*, 30 id. 638; *Van Doren v. Oiden*, 19 N. J. 117.

certificates represent earnings or income, of the corporation, they belong to the *cestui*, but if they are issued simply to

come, and proceeds, such stock dividend must be considered as income from the original investment, and belongs to the tenant for life; but if anything is given to the trustee, not as interest, dividend, or proceeds, but as part of the capital, it is capital, and belongs to the remainder-man. The court sent the case to a referee to determine the facts. In New Jersey, in the case of *Van Doren v. Olden*, 19 N. J. Eq. 117, the chancellor approved of the reasoning of the court in New York and Pennsylvania, and sent the case to a master to inquire and report how much of the stock dividend was capital, and how much income, and also how much of the stock dividend was made up of accumulations before the investment of the trust fund in the stock of the corporation, and how much of it came from earnings after the investment. The court of Massachusetts notices a difficulty in making satisfactory inquiries on these points, as corporations might refuse to expose their business, or they might be out of the jurisdiction of the court, and situated so that it would be impossible to arrive at a satisfactory result. It is quite important that a principle should be established to guide trustees in the performance of their duties, as in many cases the remainder-men are infants, or they are not even in existence when the question arises, and should be settled. Generally, the sights of such *cestuis que trust* cannot be definitively adjusted until they are competent to act for themselves, and call for a settlement of the accounts. Thus trustees may be compelled to rectify any mistake they may make in this matter years after the event. See the question further discussed by Mr. Justice Ladd in *Lord v. Brooks*, 52 N. H. 77.

In *Read v. Head*, 6 Allen, 174, it was decided that dividends of a land company, whose income was made from sales of its land or capital in business, belonged to the tenant for life under the will of a testator, although such sales might exhaust the capital of the corporation and entirely defeat the remainder-man. This decision went upon the ground that it was the intention of the testator when he devised the income of such stock to one for life, that, as the tenant for life could have no income except from such dividends as came from capital, he must take the dividends as made. All the cases profess to go upon the intention of the testator. Therefore a testator may foreclose this question in his will by giving such directions as to leave no question as to his intention. And see *Balch v. Hallett*, 10 Gray, 403; *Heard v. Eldredge*, 109 Mass. 258.

In *Atkins v. Abree*, 12 Allen, 359, where a corporation increased the number of its shares, and required the par value of such shares to be paid in by the subscribers therefor; and as the shares were above par, and as the right to subscribe for the same was a valuable right, it gave this right to its old stockholders,—it was determined that this right belonged to the capital invested, and went to the remainder-man with the capital; that it

equalize the value of the interests of stockholders in two corporations about to be consolidated, they belong to the *corpus* of the estate.<sup>1</sup>

§ 546. A different rule seems to apply to the gift of a farm and stock of cattle for life. In such cases, all improvements made upon the real estate by the tenant for life will accrue to the remainder-man as of course. But any increase in the farming stock will belong to the tenant for life. He is under no obligation to increase the stock upon the farm; and if he does so, the increase will not be capital, but will inure to the benefit of the tenant for life or his representatives.<sup>2</sup> A

was neither a cash nor a stock dividend, nor income of any kind, but an advantage, or possibility, or opportunity belonging to the capital; see *Gray v. Portland Bank*, 3 Mass. 364, to the same effect. But in *Wiltbank's App.*, 64 Penn. St. 256, a corporation increased its shares, and gave the right to subscribe therefor to its old shareholders at par; a trustee took the shares that the trust estate was entitled to subscribe for, and paid for them with his own money, and sold the shares for an advance. This advance he carried to the credit of the capital of the trust fund, which would eventually have gone to the remainder-man. But the court held, that this advance above the par value was a "premium" on the stock, and was a "product" of it, and belonged to the tenant for life. If this case is carried to its logical results, it must be held that if a trustee sells stock for more than it is appraised in his inventory, or if he invests in the stock of a corporation, and such stock increases in value from any cause, he must in all cases pay the increased value to the tenant for life. This may not be just and equal for the remainder-man, for he must bear all the risks of depreciation, or of total loss from long delay; while, on the other hand, if this rule is carried out, it is not possible for him to reap any advantage from an increase of value.

The great argument in Massachusetts, which does not seem yet to have been considered by the court, is this: Corporations are forbidden to make dividends except from profits; if, therefore, a corporation declares a dividend, whether payable in stock or in money, such dividend must accrue from profits upon the capital invested, and, it being profit upon the capital stock invested, it must belong to the tenant for life.

<sup>1</sup> *Goldsmith v. Swift*, 25 Hun, 201.

<sup>2</sup> *Robertson v. Collier*, 1 Hill, Eq. 370; *Calhoun v. Furgeson*, 3 Rich. Eq. 170; *Woods v. Sullivan*, 1 Swanst. 507; *Horrey v. Glover*, 2 Hill, Eq. 515; *Patterson v. High*, 8 Ired. Eq. 52; *Scott v. Dobson*, 1 H. & McH. 160; *Wooten v. Burch*, 2 Md. Ch. 191; *Holmes v. Mitchell*, 4 id. 163; *Pat-*

different rule was applied in the Southern States in relation to the gift of negro slaves for life. In Virginia, Alabama, North Carolina, and South Carolina, the increase of such slaves was added to the capital, and went to the remainder-man.<sup>1</sup> In Maryland, the general rule was applied, and the tenant for life took the increase of the slaves;<sup>2</sup> but where the *income* of a farm, on which there were slaves, was given to one for life, the increase was allowed to the remainder-man.<sup>3</sup> In Pennsylvania, it was held that the remainder-men were entitled to farm stock and implements purchased by the tenant for life to keep up the stock and tools; but this was under the special words of a will.<sup>4</sup> The general rule is, that the tenant for life is under no obligation to replace those things given for life, which are consumed by the using, and, if he purchases other articles in the place of them, such articles are his own.<sup>5</sup> Underbrush and timber cut periodically in the regular course of thinning forests, are to be treated as income, and belong to the tenant for life; but timber not cut in the regular course of thinning, but to improve the growth of the remaining trees, belongs to the capital of the trust. Gravel sold from land is income, and the proceeds belong to the tenant for life; but the expense of fencing waste lands given for the general benefit of the trust must be paid out of the capital.<sup>6</sup> The share of the testator in the profits of a

terson *v.* Devlin, 1 McM. 459; Evans *v.* Inglehart, 6 G. & J. 172; Poindexter *v.* Blackburn, 1 Ired. Eq. 286; Saunders *v.* Houghton, 8 id. 217; Hunt *v.* Watkins, 1 Humph. 498.

<sup>1</sup> Ellison *v.* Woody, 6 Munf. 368; Calhoun *v.* Furgeson, 3 Rich. Eq. 160; Covington *v.* McEntire, 2 Ired. Eq. 316; Patterson *v.* High, 8 id. 52; Milledge *v.* Lamar, 4 Des. 616; Strong *v.* Brewer, 7 Ala. 713; Robertson *v.* Collier, 1 Hill, Eq. 370; Patterson *v.* Devlin, 1 McM. 459; Horrey *v.* Glover, 2 Hill, Eq. 515.

<sup>2</sup> Scott *v.* Dobson, 1 H. & McH. 160; Holmes *v.* Mitchell, 4 Md. Ch. 163; Wooten *v.* Burch, 2 id. 191; Evans *v.* Inglehart, 6 G. & J. 172.

<sup>3</sup> Holmes *v.* Mitchell, 4 Md. Ch. 263; 4 Md. R. 532.

<sup>4</sup> Flowers *v.* Franklin, 5 Watts, 265.

<sup>5</sup> Patterson *v.* Devlin, 1 McM. 459; Calhoun *v.* Furgeson, 3 Rich. Eq. 160; Black *v.* Ray, 1 Dev. & B. Eq. 443; Covenhoven *v.* Shuler, 2 Paige, 131.

<sup>6</sup> Cowley *v.* Wellesley, L. R. 1 Eq. 657; 35 Beav. 637; and see Honeywood *v.* Honeywood, L. R. 18 Eq. 306.



partnership which is to continue after his death belongs to the life *cestui*.<sup>1</sup> But any accretion to the fund itself which is to be invested as by the rise in value of securities goes to the remainder-man. The life tenant also derives advantage from this increased value through the larger income resulting, but if the securities mature or are sold, the increased value belongs to the remainder.<sup>2</sup>

§ 547. Where there is a *specific* gift for life of things which are consumed in the using, the tenant for life must have the possession and the use, according to the gift, and the gift or remainder over is void.<sup>3</sup> But if the gift of such articles, or of perishable articles, is *residuary* or *general*, the trustee must sell the articles and invest the proceeds, so that the tenant for life may receive the interest or income, and the principal sum remain for the remainder-man.<sup>4</sup> If the property consists of leaseholds, annuities, or other interests, which grow less valuable by lapse of time, they must be sold, and the proceeds invested in some permanent form, so

<sup>1</sup> *Heighe v. Littig*, 63 Md. 301.      <sup>2</sup> *In re Gerry*, 103 N. Y. 450.

<sup>3</sup> *Tyson v. Blake*, 22 N. Y. 558; *Shaw v. Huzzey*, 41 Maine, 495; *Scott v. Perkins*, 28 id. 22; *McDonnald v. Walgrove*, 1 Sandf. Ch. 275; *McLane v. McDonald*, 2 Barb. S. C. 537; *Wright v. Miller*, 8 N. Y. 25.

<sup>4</sup> *Clark v. Clark*, 8 Paige, 152; *Williamson v. Williamson*, 6 Paige, 298; *Randall v. Russell*, 3 Mer. 194; *Porter v. Tournay*, 3 Ves. Jr. 314; *Andrew v. Andrew*, 1 Col. C. C. 690; *Spear v. Tinkham*, 2 Barb. Ch. 211; *Emmons v. Cairns*, 3 Barb. 243; *Cairns v. Chaubert*, 9 Paige, 160; *Woods v. Sullivan*, 1 Swanst. 507; *Covenhoven v. Shuler*, 2 Paige, 122; *Eichelberger v. Barnitz*, 17 Serg. & R. 293; *Booth v. Ammerman*, 4 Bradf. 132; *Bradner v. Falkner*, 2 Kern. 472; *Patterson v. Devlin*, 1 McMul. Eq. 459; *Robertson v. Collier*, 1 Hill, Eq. 373; *Horrey v. Glover*, 2 Hill, Eq. 515; *Calhoun v. Furgeson*, 7 Rich. Eq. 165; *Saunders v. Houghton*, 8 Ired. Eq. 217; *Taylor v. Bond*, 1 Busb. Eq. 25; *Homer v. Shelton*, 2 Met. 194. In Maryland, however, under the act of 1798, c. 101, it was held that the general rule as to conversion was not in force in that State, and that the tenant for life under a *general* residuary clause was entitled to enjoy the articles of property that fell into the residue *in specie*. *Evans v. Inglehart*, 6 G. & J. 192. But if the residue consists of money, or property, the use of which is a conversion into money, the executor or trustee must convert it into money and invest it. *Evans v. Inglehart*, 6 G. & J. 192; *Wooten v. Burch*, 2 Md. Ch. 199.

that the interest can be paid to the tenant for life, and the remainder-man can receive a proper sum as principal.<sup>1</sup> If the trustee does not convert such property within a reasonable time, the remainder-man can proceed against him as for a breach of trust. The tenant for life will be compelled to refund whatever he has received beyond his equitable proportion, and the trustees, in the event of the failure or inability of the tenant for life to refund, must make good the difference.<sup>2</sup> If, however, the remainder-man acquiesces for a long time in the receipt of the whole actual income by the tenant for life, or does not claim any relief for such payments, the court will confine its decree to conversion. So, if all parties consent that annuities and other rights may not be sold, the court will sanction their retention by the trustees.<sup>3</sup> The rights of tenant for life and remainder-man will

<sup>1</sup> *Ante*, §§ 449, 450; *Minot v. Thompson*, 106 Mass. 584; *Howe v. Dartmouth*, 7 Ves. 137; *Mills v. Mills*, 7 Sim. 501; *Lichfield v. Baker*, 2 Beav. 481; *Alcock v. Sloper*, 2 Myl. & K. 701; *Fearn v. Young*, 9 Ves. 552; *Pickering v. Pickering*, 2 Beav. 57; 4 Myl. & Cr. 298; *Dimes v. Scott*, 4 Russ. 200; *Cairns v. Chaubert*, 9 Paige, 160; *Clark v. Clark*, 8 Paige, 152; *Benn v. Dixon*, 10 Sim. 636; *Eichelberger v. Barnitz*, 17 Serg. & R. 293; *Covenhoven v. Shuler*, 2 Paige, 132; *Wooten v. Burch*, 2 Md. Ch. 190; *Kinmouth v. Brigham*, 5 Allen, 270. Farming stock is not within the rule. *Groves v. Wright*, 2 K. & J. 347.

<sup>2</sup> *Ibid.*; *Kinmouth v. Brigham*, 5 Allen, 270. In *Meyer v. Simonson*, 5 De G. & Sm. 726, Vice-Chancellor Parker stated the rules which govern the court on the subject as follows: The personal estate of a testator may be considered as divided into three different classes: (1) Property which is found at the testator's death invested in such securities as the court can adopt, as money in the funds or on real securities. The tenant for life is entitled to the whole income of this. (2) Property which can be converted into money without sacrificing anything by a forced sale. As to this the rule is clear: It must be converted, and the produce must be invested in securities which the court allows, and the tenant for life is entitled to the income of such investment. (3) Property which, according to a reasonable administration, is not capable of an immediate conversion, and which cannot be sold immediately without involving a sacrifice of both principal and interest. In this case the rule is to take the value of the testator's interest, and to give the tenant for life the income of that present value. *Kinmouth v. Brigham*, 5 Allen, 270.

<sup>3</sup> *Lichfield v. Baker*, 2 Beav. 481; *Pickering v. Pickering*, 4 Myl. & Cr. 298; *Glengall v. Barnard*, 5 Beav. 245.

depend very much upon the construction of the will and the directions contained in it.<sup>1</sup> If leaseholds and terminable annuities are rapidly growing less valuable, or if other property is perishing, and they are given *specifically* in the will for the tenant for life, he is entitled to them, although the remainder-man will be entirely excluded; for the reason that the testator himself had the right to make such disposition of his estate as he saw fit, and if he conferred upon the remainder-man only the possible chance of taking what might be left by the tenant for life unexhausted, the remainder-man will receive all that was intended for him, and he has no right to complain.<sup>2</sup> (a) So where discretion was given to trustees, to pay the income to a tenant for life, or to purchase an irredeemable annuity, and there was a gift over, and the trustees did not purchase the annuity, but paid the *cestui que trust* from time to time more than the income, but less than the principal, it was held to be a proper exercise of the discretion.<sup>3</sup> In England, whenever a fund is held on an authorized permanent investment, the life tenant is to receive the entire actual income, and no part of it is to be set aside to indemnify the remainder-men for the disadvantage resulting to them from the purchase above par of stock that has only a short time to run, and for which they will receive only par. Massachusetts follows the English law though refusing to lay down any universal rule, preferring

<sup>1</sup> Moseley v. Marshall, 22 N. Y. 205.

<sup>2</sup> Howe v. Dartmouth, 7 Ves. 149; 2 Wh. & T. L. C. 321; Lord v. Godfrey, 4 Madd. 455; Vaughan v. Buck, 1 Phill. 80; Bethune v. Kennedy, 1 Myl. & Cr. 116; Pickering v. Pickering, 4 id. 299; Phillips v. Sargent, 7 Hare, 33, where it was held that, if the trustees wrongfully converted such property, the tenant for life was entitled to the whole fund to the exclusion of the remainder-man. Beaufoy's Est., 1 Sm. & Gif. 22; Re Steward's Est., 1 Dru. 636; Howe v. Howe, 14 Jur. 359; Cotton v. Cotton, id. 950; Morgan v. Morgan, 14 Beav. 72; Pickup v. Atkinson, 4 Hare, 628; Prendergast v. Prendergast, 3 H. L. Cas. 195.

<sup>3</sup> Messina v. Carr, L. R. 9 Eq. 260, and see Miller v. Miller, L. R. 13 Eq. 267.

(a) See Thomas v. Williams, 24 Ch. D. 558; In re Chancellor, 26 id. 42; Re Leonard, 43 L. T. 664.

to deal with each case as it arises.<sup>1</sup> The case cited is a very strong one; the court covers the ground thoroughly, and goes to the pith of the matter, remarking that substantial justice between life tenant and remainder-men is the object, that the object of investment in stocks that are above par is not alone the increased interest, but the higher security of the capital, and that if the interest is to be divided between life tenant and remainder-men, a problem of infinite difficulty arises in the question, how, upon what line or principle, shall the division be made?<sup>1</sup> In a later case in Massachusetts, however, the majority of the court held that if a trustee holding a fund to pay the income to a certain person for life, with remainder over, makes an investment at a premium in bonds payable at a day certain, he may retain from the income enough to make good to the capital the amount of premium paid. The court notices *Hemenway v. Hemenway*, and seeks, not to seem to overrule, but to avert its force, and distinguish it. The effort does not seem successful, and the dissent of Morton, C. J., and Allen and Holmes, JJ., contains far the weightier argument.<sup>2</sup> (a) Where a trustee buys at the foreclosure sale of his mortgage and afterwards sells the land at a profit, this belongs to the *corpus* of the estate, and not to the life tenant.<sup>3</sup>

§ 548. If there is a *positive direction* in a will that the trustees shall convert the personal property into government or real securities, and hold them in trust for one for life and remainder over, the *cestui que trust* for life is entitled to receive only so much income as would have arisen from the personal estate if converted and invested within a year after the testator's death. It has already been stated that trustees are allowed one year to convert the estate into the

<sup>1</sup> *Hemenway v. Hemenway*, 134 Mass. 447.

<sup>2</sup> *New England Trust Co. v. Eaton*, 140 Mass. 532.

<sup>3</sup> *Parker v. Johnson*, 37 N. J. Eq. 366.

(a) See *Lord v. Brooks*, 52 N. H. Moss's Appeal, 83 Penn. St. 264; 72; *Brinley v. Grou*, 50 Conn. 66; s. c. 24 Am. Rep. 164, and note. *Millen v. Guerrard*, 67 Ga. 284;

securities directed by the will or allowed by the law.<sup>1</sup> If, therefore, a security bearing a much higher rate of interest remains undisposed of, they cannot pay the whole interest so arising to the tenant for life; and if they pay to him the whole extra interest, they would be liable to make good to the remainder-man the difference between what should have been paid under the above rule, and the sum actually paid.<sup>2</sup> If they afterwards dispose of the security, thus bearing a higher rate of interest, more advantageously than they could have done within the year, they will not be allowed to reimburse themselves for the sums they are liable to pay to the remainder-man; but they will be charged with all the interest they received, and with the full amount for which they sold the securities, and will be credited only with the amount that they should have paid the tenant for life.<sup>3</sup> It is said, however, that if there is no express direction in the will for conversion, the trustees will be justified in paying over to the tenant for life all the income received from the securities, whatever the rate of interest,<sup>4</sup> for trustees have a discretion to convert or not as they see fit.<sup>5</sup> (a)

§ 549. The trustee must exert himself equally to protect the tenant for life and the remainder-men. Therefore, if there are reversionary interests or rights that may not fall in during the life of the tenant for life, so that he can enjoy a benefit from them, the trustee must sell and convert them into money, if they have a value and admit of conversion.<sup>6</sup> As the tenant for life, if entitled to the possession, is a *quasi* or implied trustee for the remainder-man, and is ac-

<sup>1</sup> *Ante*, § 462.

<sup>2</sup> *Dimes v. Scott*, 4 Russ. 195.

<sup>3</sup> *Dimes v. Scott*, 4 Russ. 195.

<sup>4</sup> *Howe v. Dartmouth*, 7 Ves. 150; *Williamson v. Williamson*, 6 Paige, 303; *Prendergast v. Prendergast*, 3 H. L. Cas. 195; *Meyer v. Simonson*, 5 De G. & Sm. 726.

<sup>5</sup> *Yates v. Yates*, 28 Beav. 637.

<sup>6</sup> *Howe v. Dartmouth*, 7 Ves. 150; *Fearn v. Young*, 9 Ves. 549; *Dimes v. Scott*, 4 Russ. 200; *ante*, § 450.

(a) See *In re Muffett*, 39 Ch. D. 534.

countable for the highest good faith,<sup>1</sup> so the trustee and the remainder-man must exercise the like good faith towards the tenant for life; and if they join in evicting him from the possession, they will be compelled to make good the rent, whether they received any or not, and that without any equitable allowances.<sup>2</sup> (a)

§ 550. In *Sitwell v. Bernard*, the testator directed his personal estate to be laid out in lands to be settled upon A. for life with remainder over, and that "the interest of his personal estate," meaning interest upon debts due that could not be collected immediately, "should be accumulated and laid out in lands to be settled to the same uses." Of course, if the collections of some outstanding debts were deferred for a considerable time, and the interest accumulated as directed, the tenant for life would lose the income of all the estates to be purchased with the accumulated interest. To obviate this hardship upon the tenant for life, the court confined the accumulation to one year from the testator's death, on the ground that one year was allowed for settling estates and collecting debts, and that, at the expiration of that time, the trustees should be presumed to be ready to make the investment as directed; and if it was not made at that time, that the tenant for life would be entitled to the interest received upon the personal estate, in the place of the income that he would receive from the real estate if the investment was made at the end of one year.<sup>3</sup>

<sup>1</sup> *Ante*, § 540.

<sup>2</sup> *Kaye v. Powell*, 1 Ves. Jr. 408.

<sup>3</sup> *Sitwell v. Bernard*, 6 Ves. 520; *Entwistle v. Markland*, and *Stuart v.*

(a) See *Tiffany v. Munroe*, 19 R. I. 584; *R. I. Hospital Tr. Co. v. Harris* (R. I.), 39 Atl. 750; *Cornell's Estate*, 41 N. Y. S. 539; *Greene v. Greene*, 19 R. I. 619; *Parker v. Seeley*, 56 N. J. Eq. 110. If trustees have a discretion as to the manner of raising a charge, and the remainder is prejudiced by their postponing the raising of the charge from a wasting security, the court may adjust the burden of the charge according to the parties' interests and require the tenant for life to contribute. *Blake v. O'Reilly*, [1895] 1 Ir. R. 479; see *In re Harrison*, 43 Ch. D. 55.

On the other hand, if a testator devises his real estate to be sold, and the proceeds thereof, and the rents and profits in the meantime, to be laid out in securities to be settled on A. for life, with remainders over, the accumulation of the rents and profits will be allowed for only one year; that is, there will be one year allowed for the sale of the estate, and the rents and profits may accumulate for that time. If the investment is not then made, the tenant for life is entitled to the rents and profits, as if the sale and investment had been made, and until it is made.<sup>1</sup> From the expressions used by Lord Eldon, in the case of *Sitwell v. Bernard*, it was supposed that in no case could the tenant for life receive any part of the income, where there was a direction to convert personalty into land, or land into personalty; and it was so determined in two cases,<sup>2</sup> but it is now settled that the tenants for life shall have the first year's income, where there is no express direction to accumulate.<sup>3</sup>

§ 551. The rule, that a tenant for life has an interest in the first year's income, varies according to the circumstances of each case. Mr. Lewin<sup>4</sup> states the following propositions and distinctions, gathered from the cases: (1) The tenant for life of a residue is not entitled to the income accruing, during the delay allowed for the payment of the legacies, on so much of the testator's property as is subsequently

*Bruere*, cited 6 Ves. 528, 529; *Griffith v. Morrison*, cited 1 J. & W. 311; *Tucker v. Boswell*, 5 Beav. 607; *Kilvington v. Gray*, 2 S. & S. 396; *Parry v. Warrington*, 6 Madd. 155; *Stair v. Macgill*, 1 Bligh (n. s.), 662; *Walker v. Shore*, 19 Ves. 387; *Taylor v. Clark*, 1 Hare, 167; *Cassamajor v. Pearson*, 8 Cl. & Fin. 69.

<sup>1</sup> *Noel v. Henley*, 7 Price, 241; *Vickers v. Scott*, 3 Myl. & K. 500; *Vigor v. Harwood*, 12 Sim. 172; *Greisley v. Chesterfield*, 13 Beav. 288; *Beauland v. Halliwell*, 1 C. P. Coop. t. Cott. 169, note (a).

<sup>2</sup> *Sitwell v. Bernard*, 6 Ves. 520; *State v. Hollingworth*, 3 Madd. 161; *Taylor v. Hibbert*, 1 J. & W. 388.

<sup>3</sup> *Angerstein v. Martin*, T. & R. 238; *Hewitt v. Morris*, id. 244; *Macpherson v. Macpherson*, 16 Jur. 847; *Green v. Blackwell*, 32 N. J. Eq. 773; *Van Blarcom v. Dager*, 31 id. 783.

<sup>4</sup> Lewin on Trusts, 247, 248, 249 (5th ed.).

applied in paying them.<sup>1</sup> (2) If a testator desires that his personal estate shall be laid out and invested either in government or real securities in trust for one for life, with remainders over; or in a purchase of lands, with a direction, express or implied, for the investment thereof in the meantime in government or real security, and that the lands to be purchased shall be in trust for A. for life, with remainders over, — the income of the “government and real securities,” of which the testator was possessed at the time of his death, these being the very investments contemplated by his will, belongs from the time of the death to the tenant for life.<sup>2</sup> (a) (3) If the sale and investment, or conversion, is made immediately, during the first year, the tenant for life is entitled to the produce of the property in the converted form “from the time of the conversion,” although the trustee had the whole year to convert it.<sup>3</sup> (4) Where, at the death of the testator, the property is not in the state in which it is directed to be, the tenant for life, before the conversion, is entitled, as the court has decided, not to the actual produce, but to a reasonable fruit of the property, from the death of the testator up to the time of the conversion, whether made in the course of the first year or subsequently; as, if personal estate is directed to be laid out in government or real securities, and part of the personal estate consists of bonds, stocks, &c., not being government or real securities, the tenant for life is entitled to the dividends from the death of the testator, or so much three per cent consolidated bank annuities as such part of the personal estate, not being government or real securities, would have purchased at the expiration of one

<sup>1</sup> *Holgate v. Jennings*, 24 Beav. 623; *Crawley v. Crawley*, 7 Sim. 427; *Crawley v. Dixon*, 23 Beav. 512; *Fletcher v. Stevenson*, 9 Hare, 371.

<sup>2</sup> *Hewitt v. Morris*, T. & R. 241; *La Terriere v. Bulmer*, 2 Sim. 18; *Angerstein v. Martin*, T. & R. 232; *Caldicott v. Caldicott*, 1 Y. & C. Ch. 337.

<sup>3</sup> *La Terriere v. Bulmer*, 2 Sim. 18; *Gibson v. Bott*, 7 Ves. 89; *Angerstein v. Martin*, T. & R. 240.

(a) See *Allhusen v. Whittell*, L. 2 Ch. D. 199; *Porter v. Baddeley*, 5 R. 4 Eq. 199; *Marshall v. Crowther*, id. 542; *In re Harrison*, 43 id. 55.



year from the testator's death.<sup>1</sup> (5) Where the non-conversion is attended with any risk to the property, as in case of bonds, &c., the remainder-man, whose interest is thus imperilled, has a right to share in the extra profit of the annual produce;<sup>2</sup> but suppose land to have yielded a rental beyond what would have been the annual produce of the purchase-money, and there has been no depreciation, can the remainder-man call back the extra rent received by the tenant for life; or, as the remainder-man gets all that was ever intended for him, viz., the undepreciated property, may the tenant for life keep the full rent? If not, then conversely, if the land yields no annual fruit, or less than what the purchase-money would yield, the tenant for life should have a claim against the remainder-man.<sup>3</sup> But if the tenant for life is also a trustee for sale, and neglects to sell, he cannot be allowed to put into his own pocket the higher annual produce which has arisen "from his own" laches; for no trustee can derive a profit from the exercise or non-exercise of his own office.<sup>4</sup> (6) In *Gibson v. Bott*,<sup>5</sup> leaseholds from a defect of title could not be sold, and the court gave the tenant for life interest at four per cent on the value from the death of the testator. It does not appear from the report at what time the value was to be taken; but according to recent cases it should have been ascertained at the expiration of one year from the testator's death.<sup>6</sup> (7) If a testator's estate comprises funds not immediately convertible, but receivable by instalments, such as a testator's share in a partnership, assessed at a certain sum and payable by instalments, carrying interest at five per cent, the tenant for life is allowed

<sup>1</sup> *Dimes v. Scott*, 4 Russ. 495; *Douglass v. Congreve*, 1 Keen, 410; *Taylor v. Clark*, 1 Hare, 161; *Morgan v. Morgan*, 14 Beav. 72; *Holgate v. Jennings*, 24 Beav. 623; *Llewellyn's Trust*, 29 id. 171; *Hume v. Richardson*, 8 Jur. (N. S.) 686.

<sup>2</sup> *Dimes v. Scott*, 4 Russ. 495; *Stroud v. Gwyer*, 28 Beav. 130.

<sup>3</sup> *Yates v. Yates*, 28 Beav. 637.

<sup>4</sup> *Wightwick v. Lord*, 6 H. L. Cas. 217.

<sup>5</sup> 7 Ves. 89.

<sup>6</sup> *Caldicott v. Caldicott*, 1 Y. & C. Ch. 312; *Sutherland v. Cook*, 1 Col. C. C. 503.

four per cent, from the death of the testator, on the value taken at the expiration of one year from the testator's death.<sup>1</sup>

(8) If it appears from the terms of the will, that the testator intended to give his trustees a discretion as to the time of conversion, which discretion has been fairly exercised, and that the tenant for life was to have the actual income until conversion, the case must be governed by the testator's intention, and not by the general rule.<sup>2</sup>

<sup>1</sup> *Llewellyn's Trust*, 29 Beav. 171; *Meyer v. Simonson*, 5 De G. & Sm. 723.

<sup>2</sup> *Mackie v. Mackie*, 5 Hare, 70; *Wrey v. Smith*, 14 Sim. 202; *Sparling v. Parker*, 9 Beav. 524; *Johnstone v. Moore*, 4 Jur. (N. S.) 356; *Murray v. Glasse*, 17 Jur. 816.

Mr. Hill says, that "the interest which the tenant for life will take during the first year after the testator's death is yet an unsettled question. This question admits of four possible solutions, and the decisions of very eminent judges may be urged in support of each: (1) First, the tenant for life may be entitled to nothing until the expiration of a twelvemonth from the testator's death, according to the opinion of Sir John Leach in *Scott v. Hollingworth*, 3 Madd. 161; *Vickers v. Scott*, 3 Myl. & K. 509, and of Sir Thos. Plumer in *Taylor v. Hibbert*, 1 J. & W. 308 (see *Tucker v. Boswell*, 5 Beav. 607); and the income in the meantime is to be added to and form a part of the capital of the residue. Both those learned judges appear to have assumed that this opinion was in accordance with the established rule of the court, and Sir Thos. Plumer treats this general rule as having been so settled by Lord Eldon in the case of *Sitwell v. Bernard*, 6 Ves. 522. However, in the subsequent case of *Angerstein v. Martin, T. & R.* 238, and see *Hewitt v. Morris*, id. 244, that great judge himself disclaimed any intention of establishing any such general rule by his decision in *Sitwell v. Bernard*, 6 Ves. 522,—a decision which he stated to have been founded on the direction to accumulate, which formed an ingredient in that case; and his lordship's further observations on the decisions in *Sitwell v. Bernard* and *Scott v. Hollingworth* have materially weakened the authority of those cases, if indeed they do not expressly overrule them. The case of *Vickers v. Scott*, 3 Myl. & K. 500, arose upon real estate, which was directed to be sold, and the point in question does not seem to have been much argued in that case. (2) According to the decision of A. Hart, V. C., in *La Terriere v. Bulmer*, 2 Sim. 18, the *cestui que trust* for life during the first year after the testator's death will take the income of such parts of the estate as are properly invested at the testator's death, or may become so invested during that year. Lord Eldon's decisions in *Gibson v. Bott*, 7 Ves. 95; *Hewitt v. Morris, T. & R.* 241, are also in favor of this doctrine, which is also strongly supported by the

§ 552. The liability of the equitable tenant for life in respect to repairs and waste is substantially the same as the

observations of Sir J. Wigram, V. C., in the recent case of *Taylor v. Clark*, 1 Hare, 173. See also *Caldicott v. Caldicott*, 1 Younge & C. Ch. 312. (3) The tenant for life may be entitled to the income arising from the property in its existing state during the first year from the testator's death. And this view of the law is supported by Lord Eldon's decision in the case of *Angerstein v. Martin*, T. & R. 232, and that of Lord Langdale, M. R., in *Douglass v. Congreve*, 1 Keen, 410. It has been observed by Vice-Chancellor Wigram, 1 Hare, 172, 1 Younge & C. Ch. 318, that it might be a question whether Lord Eldon's decree in *Angerstein v. Martin* was intended to impeach the law as laid down in *La Terriere v. Bulmer*; and even if such were Lord Eldon's intentions, it must have been considered as overruled in Lord Lyndhurst's decision in *Dimes v. Scott*, 4 Russ. 209. The later case of *Douglass v. Congreve*, 1 Keen, 410, which is clearly inconsistent with *Dimes v. Scott*, was also strongly questioned by Vice-Chancellor Wigram in the recent case of *Taylor v. Clark*, 1 Hare, 172, in which all the authorities on this subject are collected and reviewed, and his honor's decision, in which he followed *Dimes v. Scott* in preference to *Douglass v. Congreve*, is directly at variance with the latter case. (4) According to the determination of Lord Lyndhurst in *Dimes v. Scott*, the tenant for life will take, not the interest actually arising from the property during the first year after the testator's death, but the amount of the dividends on so much three per cent stock as would have been produced by the conversion of the property at the end of that year. And this solution of the question has recently been adopted by Vice-Chancellor Wigram in the case of *Taylor v. Clark*, 1 Hare, 161." Hill on Trustees, pp. 388, 389.

Mr. Hill further observes, "that, in this conflict of authority, the question can be put to rest only by the decision of the court of the highest authority. And that in the mean time the fourth alternative, as established by Lord Chancellor Lyndhurst in *Dimes v. Scott*, 4 Russ. 299, and adopted in *Taylor v. Clark*, 1 Hare, 172, must be considered as carrying with it the greatest authority in its favor." Mr. Spence, Eq. Jur. 564, fully discusses the authorities, and approves of *Dimes v. Scott*. That case was also followed in *Morgan v. Morgan*, 14 Beav. 72, in which the case of *Douglass v. Congreve* was overruled. *Holgate v. Jennings*, 24 Beav. 623; *Re Llewellyn's Trust*, 29 Beav. 171; *Hume v. Richardson*, 8 Jur. (N. S.) 686, followed *Dimes v. Scott*. And see *Robinson v. Robinson*, 1 De G., M. & G. 247; *Scholefern v. Redfen*, 2 Dr. & Sm. 173; 32 L. J. Ch. 627; *Meyer v. Simonson*, 5 De G. & Sm. 726.

In the United States, the question has not been largely discussed, but in *Evans v. Inglehart*, 6 G. & J. 191, and *Williamson v. Williamson*, 6 Paige, 303, the court assumed that the law was correctly stated in the third alternative, or in *Angerstein v. Martin*, 2 Sim. 18. In *Massachu-*

liability of a legal tenant for life,<sup>1</sup> except that the trustee cannot interfere with the possession of the equitable tenant for life if he neglects to repair; nor for permissive waste,<sup>2</sup> if there is nothing in the settlement that gives him the management or control of the estate. A legal tenant for life may cut timber for repairs,<sup>3</sup> though he cannot cut timber for sale, or to pay for repairs.<sup>4</sup> So a trustee may cut timber for repairs, if the tenant for life will furnish the means for using the timber in repairing; for the trustee can sell no timber for repairs, nor can he use any other trust funds for the purpose, unless specially authorized by the instrument of trust. Nor can the trustees raise any sum out of, or make any charge upon, the *corpus* of the estate itself for repairs, however the want of such repairs may be occasioned.<sup>5</sup> (a) The equitable tenant for life must defray the

setts, the matter is regulated by statute, that the tenant for life shall be entitled to the income for the first year upon the fund given for his use. Gen. Stat. c. 97, § 23; *Sohier v. Eldredge*, 103 Mass. 351; *Sargent v. Sargent*, id. 297; *Brown v. Gellatly*, L. R. 2 Ch. 751; *Lamb v. Lamb*, 11 Pick. 371; *Minot v. Amory*, 2 Cush. 377, 388; *Lovering v. Minot*, 1 id. 157.

<sup>1</sup> *Powys v. Blgrave*, 4 De G., M. & G. 458, and cases cited; *Harnett v. Maitland*, 16 M. & W. 257.

<sup>2</sup> *Powys v. Blgrave*, Kay, 495; 4 De G., M. & G. 448; *Re Skingley*, 3 M. & G. 221; *Gregg v. Coates*, 23 Beav. 33.

<sup>3</sup> Co. Litt. 54 b.

<sup>4</sup> Co. Litt. 53 b; *Gower v. Eyre*, G. Coop. 156; *Marlborough v. St. John*, 5 De G. & Sm. 181.

<sup>5</sup> *Ante*, § 477; *Bostock v. Blakeney*, 2 Bro. Ch. 653; *Hibbert v. Cooke*, 1 S. & S. 552; *Nairn v. Majoribanks*, 3 Russ. 582; *Caldicott v. Brown*, 2

(a) It is the duty of the tenant for life to keep up the buildings, although he may be by law punishable for waste. In England trust-money to be invested in the purchase of real estate may be applied to the erection of new buildings, but this does not apply to repairs and permanent improvements. See *Re De Teissier's Settled Estates*, [1893] 1 Ch. 153; 186. *Leighton v. Leighton*, 75 L. T. 338; *Stevens v. Melcher*, 152 N. Y. 551. Under a will providing that in dealing with real estate, the trustees are "to make out of the income or capital" any outlay which they consider proper, the corpus of the realty can be charged by mortgage. *In re Bellinger*, [1898] 2 Ch. 534. See *Cass v. Cass*, 44 N. Y. S.

expenses of such repairs out of his own income, or the trustee must defray them out of the interest of the tenant for life. The repairs of the tenant for life are his own voluntary act; and, however substantial and beneficial to the estate and the remainder-man, he can make no claim for them upon the inheritance. Nor would a court, upon his application, direct any repairs to be made at the expense of the remainder-man;<sup>1</sup> though it was said in one case that the rule might not be without exception; as where an estate was settled to certain uses, and a fund was directed to be applied to the purchase of an estate to be settled to the same uses, it might be more beneficial to the remainder-man that part of the fund should be applied to the repair and preservation of the estate already settled.<sup>2</sup> (a) It would be an extraordinary case, however, to justify such a proceeding.<sup>3</sup> But where trustees are directed to purchase, or invest in real estate, they may put such estate in tenantable repair, and the expense of such repair will be chargeable to the trust fund as part of the purchase-money.<sup>4</sup> A testator may be under such obligations in his leases or leaseholds which he devises for life to one, with remainder over, that the trustees must make repairs, and charge the expense to the *corpus* of the estate.<sup>5</sup> So it has been held,

Hare, 144; *Thurston v. Dickinson*, 2 Rich. Eq. 317; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; *Jones v. Dawson*, 19 Ala. 672; *Thurston v. Thurston*, 6 R. I. 296; *Martin's App.*, 23 Penn. St. 438. In this case it was doubted if it was constitutional for the legislature to authorize such an expenditure by the trustee.

<sup>1</sup> *Amory v. Lowell*, 104 Mass. 265; *Hibbert v. Cooke*, 1 S. & S. 552; *Caldicott v. Brown*, 2 Hare, 144; *Bostock v. Blakeney*, 2 Bro. Ch. 653; *Hamer v. Tilsley*, Johns. (Eng.) 486; *Dent v. Dent*, 30 Beav. 363; *Nairn v. Majoribanks*, 3 Russ. 582; *Corbett v. Laurens*, 5 Rich. Eq. 301; *Sharshaw v. Gibbs*, 1 Kay, 333.

<sup>2</sup> *Caldicott v. Brown*, 2 Hare, 145; *Re Barrington's Est.*, 1 John. & H. 142.

<sup>3</sup> *Dunne v. Dunne*, 3 Sm. & Gif. 22; 7 De G., M. & G. 207; *Dent v. Dent*, 30 Beav. 363.

<sup>4</sup> *Parsons v. Winslow*, 16 Mass. 361.

<sup>5</sup> *Harris v. Poyner*, 1 Drew. 174. And see a distinction in *Hickling v. Boyer*, 1 De G., M. & G. 762.

(a) See *supra*, § 477, and notes.

that where a tenant for life makes large and permanent repairs, and subsequently the trustee sells the estate for the accommodation of all parties, the tenant for life may have a fair proportion for his repairs out of the *corpus* of the proceeds of the sale.<sup>1</sup> And in one case the court ordered the trustee to apply a sum from the personal estate to the construction of warehouses, and provided for a reservation from the rents of interest upon the sum expended during the continuance of the life-estate.<sup>2</sup> Where a testator directs that the "net proceeds" after paying charges and expenses shall go to the life tenants, all ordinary repairs and improvements and replacement of articles worn out are chargeable to the income; but probably a different rule would apply to a large and unusual expenditure, as for additional buildings.<sup>3</sup>

§ 553. Both the equitable tenant for life and the remainder-man have an insurable interest in the trust estate; and if one insures his own interest in the buildings, and they are burned, neither can call upon the other for any part of the insurance money. (a) The trustee also has an insurable interest in the buildings upon the trust estate; and if he insures, and the buildings are entirely destroyed by fire, the insurance money received is so far a conversion of the property into personalty that the trustee cannot rebuild, unless he is specially directed by the instrument of trust to do so;

<sup>1</sup> *Gambril v. Gambril*, 3 Md. Ch. 259.

<sup>2</sup> *Cogswell v. Cogswell*, 2 Edw. 231.

<sup>3</sup> *In re Jones*, 103 N. Y. 621.

(a) When a tenant for life has a duty to insure for the estate in remainder, or, apart from any such duty, does actually insure, and his act is ratified by the remainder-man, the proceeds of the insurance are to be devoted to repairing the loss. *Welsh v. London Ass. Co.*, 151 Penn. St. 607. It has also been held that insurance money collected by the tenant for life is in all cases a fund held in trust, either for rebuilding, or for the benefit both of himself and those in remainder. *Green v. Green*, 50 S. C. 514. The better view appears to be that the remainder-man has no interest in such insurance in the absence of contract giving him rights therein. See *Spalding v. Miller* (Ky.), 45 S. W. 462.

but the money so received must remain personal property, and the tenant for life and the remainder-man will receive their respective rights and interests according to the terms of the settlement.<sup>1</sup> If a building is partially burned or injured, and the trustees have an insurance policy, they should apply the money to the repair of the building.<sup>2</sup> Of course the repair of trust property is frequently the subject of express provisions in wills and settlements, and trustees must be governed by the directions contained in the instrument of trust. So there are frequent directions in instruments of trust respecting insurance of property, and the use and application of the insurance money in case of loss or damage by fire. Trustees will be governed by such directions in all cases. In Pennsylvania, there are express enactments by which repairs can be made upon trust property at the mutual expense of the tenant for life and the remainder-man; the manner of the repairs and the proportion of the expenses are to be determined by a court upon the application of any party in interest.<sup>3</sup>

§ 554. The ordinary taxes, and expenses in the care and management of the capital, are charges on the life estate, to be paid out of the capital.<sup>4</sup> But in some cases where an arrangement which gives rise to taxes is entered into for the benefit of both capital and income, the taxes may be divided between them.<sup>5</sup> The *income* of a trust estate must bear the expense of administering it.<sup>6</sup> It is the duty of the trustee to see that the equitable tenant for life, in rightful possession of the estate, pays all rates and taxes; but if the trustee pays them he cannot charge them in his account with other parties in interest.<sup>7</sup> If, however, an assessment is made against

<sup>1</sup> See *ante*, § 487; *Graham v. Roberts*, 8 Ired. Eq. 99; *Haxall v. Shippen*, 10 Leigh, 536; *Lerow v. Wilmarth*, 9 Allen, 382.

<sup>2</sup> *Brough v. Higgins*, 9 Grat. 408.

<sup>3</sup> Act May 3, 1855, § 3; *Purdon's Dig.* 973.

<sup>4</sup> *Pierce v. Burroughs*, 58 N. H. 302.

<sup>5</sup> *Barger's App.*, 100 Penn. St. 239.

<sup>6</sup> *Butterbaugh's App.*, 98 Penn. St. 351.

<sup>7</sup> *Amory v. Lowell*, 104 Mass. 265; *Fountaine v. Pellett*, 1 Ves. Jr.

the estate for something in the nature of permanent improvement or betterment of the whole estate, the assessment may be ratably and equitably divided between the tenant for life and the remainder-man.<sup>1</sup> (a) And if a third person with consent of the executor advances money to pay the taxes, neither the executor nor the life *cestui* having means to pay them, such advances become a charge on the estate.<sup>2</sup> The equitable tenant for life must pay the interest upon all incum-

342; *Tupper v. Fuller*, 7 Rich. Eq. 170; *Cairns v. Chalbert*, 2 Edw. Ch. 312; *Jones v. Dawson*, 19 Ala. 672; *Varney v. Stevens*, 22 Maine, 331. In case of a widow being tenant for life, one-third of the taxes and repairs were charged to her, *Cochran v. Cochran*, 2 Des. 521; but no general principle can be stated upon this case.

<sup>1</sup> *Plympton v. Boston Dispensary*, 106 Mass. 546.

<sup>2</sup> *Griffin v. Fleming*, 72 Ga. 703.

(a) As between equitable incumbrancers, relief will be given to the incumbrancer prior in point of date, unless he has lost his priority by some act or neglect on his own part, and relief will not be refused to him as against a subsequent incumbrancer on the sole ground of the latter being a purchaser for value without notice, unless he has the legal estate, or the best right to call for it. *Thorpe v. Holdsworth*, L. R. 7 Eq. 139, 146; *Isaac v. Wors-tencroft*, 67 L. T. 351. An incumbrancer of a trust fund who first gives notice to any of its trustees obtains priority over any incumbrancer who has given no notice to any of them. *Low v. Bouverie*, [1891] 3 Ch. 82; *In re Wyatt*, [1892] 2 Ch. 188.

As to the place of taxation of trust property, see *Trustees v. Augusta* (Ga.), 20 L. R. A. 151, and note. As to charging the expense of auditing, see *In re Bennett*, [1896] 1 Ch. 778. One who claims to be

owner, and pending litigation, in which he is held to be an involuntary trustee of the property, pays taxes or assessments thereon, cannot charge them upon the property in making settlement. *Irvine v. Angus*, 84 Fed. Rep. 127. See *Warren v. Warren*, 148 Ill. 641.

It is the duty of a trustee to raise in behalf of his *cestuis que trust*, every proper defence which can be urged to resist an action brought against him in his representative capacity. An order of court authorizing a trustee to incumber the trust property should set out all the powers, terms, and stipulations of the contract, in order to give exact notice thereof; the beneficiaries may not be able to attack such order until the mortgagee forecloses, at which time they, or the trustee as their representative, will not be estopped to assail the order authorizing the mortgage. *Clark v. Flannery*, 99 Ga. 239; *Wagnon v. Pease* (Ga.), 30 S. E. 895.



branches upon the estate,<sup>1</sup> to the extent of the rents and profits.<sup>2</sup> If a tenant pays off, and takes an assignment of an incumbrance to himself, his representatives may claim from the remainder-man the difference between the rents and profits of the estate and the interest upon the incumbrance, if he notifies the remainder-man that the rents and profits are insufficient to pay the interest;<sup>3</sup> in such cases, the tenant for life cannot be charged with wilful default, like a mortgagee in possession, except upon some very peculiar ground.<sup>4</sup> A second tenant for life is not under any obligation to apply the rents and profits accruing to him to pay off arrears of interest which accrued during the life of the preceding tenant for life; but such arrears become, as between the second tenant for life and the remainder-man, a charge upon the inheritance.<sup>5</sup> The expenses of cultivating a farm or plantation, or of running a manufacturing establishment, must be wholly defrayed by the tenant for life, or the person entitled to the income arising from such operations.<sup>6</sup> If the land under incumbrance is sold, the proceeds may be invested, and the tenant for life may take the income for life, or the net proceeds may be divided according to the annuity tables. The tables, however, are not to be taken absolutely; for reference must be had to the health of the tenant for life, and also to the condition of the land and its annual income, and whether the land is so situated that the price is rising or falling, and whether it can be easily improved.<sup>7</sup>

<sup>1</sup> *Jones v. Sherrard*, 2 Dev. & Bat. Eq. 187; *Hinves v. Hinves*, 3 Hare, 609; *Caulfield v. Maguire*, 2 Jo. & La. 141; *Cogswell v. Cogswell*, 2 Edw. Ch. 231; 4 Kent, 74.

<sup>2</sup> *Kensington v. Bouverie*, 7 De G., M. & G. 134; 19 Beav. 39.

<sup>3</sup> *Ibid.*; *Kensington v. Bouverie*, 7 H. L. Cas. 557.

<sup>4</sup> *Ibid.* See *Campbell v. Campbell*, 27 Mich. 454; *Swaine v. Perine*, 5 Johns. Ch. 482; *Van Vronker v. Eastman*, 7 Met. 157.

<sup>5</sup> *Sharshaw v. Gibbs*, 1 Kay, 333. *Penrhyn v. Hughes*, 5 Ves. 99, appears to be overruled.

<sup>6</sup> *Tupper v. Fuller*, 7 Rich. Eq. 170; *Jones v. Dawson*, 19 Ala. 672; *North Amer. Coal Co. v. Dyett*, 7 Paige, 9.

<sup>7</sup> *Niemcewicz v. Gahn*, 3 Paige, 652; *Atkins v. Kron*, 8 Ired. Eq. 1; *Gambril v. Gambril*, 3 Md. Ch. 259; *Chesson v. Chesson*, 8 Ired. Eq. 141;

§ 555. If an equitable tenant for life becomes bankrupt or insolvent, all his interest goes to his assignees, and the trustee must hold it subject to their disposition;<sup>1</sup> (a) unless the property is so given that it goes over upon the bankruptcy of the *cestui que trust*. And although it is held that a general provision that a *cestui que trust* shall not alienate his interest, or that it shall not go to his creditors or to his assignees, if the interest is an absolute one, is void, as contrary to the rule of law, that when an estate is given to a man no restrictions inconsistent with the gift are valid,<sup>2</sup> yet a gift made in such form that it is to go over upon alienation or bankruptcy of the *cestui que trust* is good.<sup>3</sup> And if the limitations are interwoven into the gift itself, they are valid; as if an estate is given to A. until he becomes bankrupt, the limitation is part of the gift, and the estate will go over upon the happening of the event.<sup>4</sup> If, however, any

Williams' Case, 3 Bland, 186; Jones v. Sherrard, 2 Dev. & Bat. 189; 4 Kent, 74.

<sup>1</sup> *Ante*, § 386; Wells v. Ely, 3 Stockt. 172.

<sup>2</sup> Rockford v. Hackman, 9 Hare, 475; 10 Eng. L. & Eq. 67; Co. Litt. 223 a; Hallett v. Thompson, 5 Paige, 583; Heath v. Bishop, 4 Rich. Eq. 46; Dick v. Pitchford, 1 Dev. & Bat. 480; Rider v. Mason, 4 Sandf. Ch. 352; Co. Litt. 223 a; Blackstone Bank v. Davis, 21 Pick. 43; Bramhall v. Ferris, 14 N. Y. 44; Etches v. Etches, 3 Drew. 441; Tillinghast v. Bradford, 5 R. I. 205; Sparhawk v. Cloon, 125 Mass. 263; Daniels v. Eldridge, id. 350; Smith v. Moore, 37 Ala. 327; McIlvaine v. Smith, 42 Mo. 45; Bremer v. Bremer, 18 Hun (N. Y.), 147. But see *per contra* in the United States, *ante*, § 386 a, *et seq.*

<sup>3</sup> Dommatt v. Bedford, 3 Ves. 149; Cooper v. Wyatt, 5 Madd. 482; Shee v. Hale, 13 Ves. 404; Brandon v. Aston, 2 N. C. C. 24; Twopenny v. Peyton, 10 Sim. 487; Page v. Way, 3 Beav. 20; Lewes v. Lewes, 6 Sim. 304; Rockford v. Hackman, 9 Hare, 475; Dickson's Trust, 1 Sim. (N. s.) 37; *Ex parte* Baddam, 2 De G., F. & J. 625; Muggridge's Trusts, John. (Eng.) 625; Dorsett v. Dorsett, 31 L. J. Ch. 122; Joel v. Mills, 3 K. & J. 458; *In re* Stultz, 17 Jur. 615.

<sup>4</sup> Stagg v. Beekman, 2 Edw. Ch. 89; Ashurst v. Given, 5 Watts & S. 323; Vaux v. Parke, 7 id. 19; Eyrick v. Hetrick, 13 Penn. St. 491; Girard Ins. Co. v. Chambers, 46 id. 485; Norris v. Johnston, 5 id. 289; Fisher v. Taylor, 2 Rawle, 33; Shee v. Hale, 13 Ves. 404; Cooper v. Wyatt, 5 Madd. 482; *Ex parte* Oxley, 1 B. & B. 257; Sharpe v. Cosserat,

(a) See Stone v. Westcott, 18 R. I. 685.

interest remains in the *cestui que trust* for life, it must go to his assignees.<sup>1</sup> If it is in the discretion of the trustees whether the *cestui que trust* shall have an interest or not, the assignees will take nothing;<sup>2</sup> (a) but if the trustees have exercised their discretion, the assignees will take the interest conferred by it.<sup>3</sup> If the limitation is to take effect only upon alienation by the *cestui que trust*, it will not take effect upon bankruptcy, and the assignees will be entitled.<sup>4</sup> The law does not permit a man to settle his property on himself, with a limitation over in case of bankruptcy.<sup>5</sup> If the income is given to the *cestui que trust* for a particular purpose which would be defeated, the property interest may not go to the assignees.<sup>6</sup>

§ 556. At common law rent could not be apportioned; and if a tenant for life died near the end of a quarter, his representatives could receive no part of the rent for the term. Statutes have now changed that rule in England;<sup>7</sup> and there

20 Beav. 470; *Yarnold v. Moorhouse*, 1 R. & M. 364; *Lockyer v. Savage*, 2 Strange, 947; *Stevens v. James*, 4 Sim. 499; *Kearsly v. Woodcock*, 3 Hare, 185; *Churchill v. Marks*, 1 Coll. C. C. 441; *Large's Case*, 2 Leon. 82. As to other limitations, see *Grace v. Webb*, 2 Phil. 701; *Lloyd v. Lloyd*, 2 Sim (N. S.) 255; *Heath v. Lears*, 1 Eq. R. 55; *Potts v. Richards*, 24 L. J. Ch. 488; *Hooper v. Dundass*, 10 Barr. 75; *Com'th v. Stauffer*, id. 350; *Maddox v. Maddox*, 11 Grat. 804.

<sup>1</sup> *Rippon v. Norton*, 2 Beav. 63; *Youngehusband v. Gisborne*, 1 Coll. N. C. C. 400; *Piercy v. Roberts*, 1 Myl. & K. 4; *Lord v. Bunn*, 2 Younge & C. Ch. 98; *Green v. Spicer*, 1 R. & M. 395; *Snowden v. Dales*, 6 Sim. 524; *Rockford v. Hackman*, 9 Hare, 475.

<sup>2</sup> *Godden v. Crowhurst*, 10 Sim. 642; *Kearsley v. Woodcock*, 3 Hare, 185; *Lord v. Bunn*, 2 Younge & C. Ch. 98; *Twopenny v. Peyton*, 10 Sim. 487; 1 Col. C. C. 400; 10 Jur. 419.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Lear v. Leggett*, 2 Sim. 479; 1 R. & M. 690; *Whitfield v. Pricket*, 2 Keen, 608; *Wilkinson v. Wilkinson*, G. Coop. 259; 3 Swanst. 528.

<sup>5</sup> *Braman v. Stiles*, 2 Pick. 463; *Mackason's App.*, 22 Penn. St. 330; *Pope v. Elliott*, 8 B. Mon. 56; *Graff v. Bonnett*, 31 N. Y. 19; *Higginbottom v. Holmes*, 19 Ves. 98; *Ex parte Hill*, 1 Cooke, Bank. Law, 291; *Murphy v. Abraham*, 15 Ir. Eq. 371; *In re Murphy*, 1 Sch. & Lef. 44.

<sup>6</sup> See *ante*, §§ 386 a, 386 b, 387, 388.

<sup>7</sup> 11 Geo. II. c. 19; 4 Wm. IV. c. 22; *St. Aubin v. St. Aubin*, 1 Dr. & Sm. 611; *Longworth's Est.*, 23 L. J. Ch. 104.

(a) See *In re Coleman*, 39 Ch. D. 443; *In re Harvey*, 60 L. T. 711.

are statutes in many of the United States making rent apportionable.<sup>1</sup> In States where there are such statutes the trustees must pay so much of the rent as accrued before the death of the tenant for life to his representatives, and the balance to the remainder-man.<sup>2</sup> But an annuity to a tenant for life is not apportionable; and if the tenant dies within three days of the day of payment, his representatives are not entitled to any proportion of the annuity.<sup>3</sup> But where an annuity is given to a widow in lieu of dower, or for maintenance of an infant, or for the separate maintenance of a married woman, an apportionment is made on the ground that such annuity is necessary for support till the death of the annuitant.<sup>4</sup> Dividends upon shares in corporations and upon stocks are not apportionable, and nothing is earned for the shareholders until the dividends are declared.<sup>5</sup> But interest-money upon notes, bonds, mortgages, and similar securities accrues from day to day, although it is not payable until a fixed day; it is therefore apportionable, and trustees must pay the proportion accruing during the life of the tenant for life to his representatives.<sup>6</sup> In Massachusetts, annuities, rent, interest, and income are made apportionable in all

<sup>1</sup> 3 Kent, Com. 471; 3 Green. Cruise, Dig. 117, note.

<sup>2</sup> *Price v. Pickett*, 21 Ala. 741.

<sup>3</sup> *Wiggin v. Swett*, 6 Met. 194; *Tracy v. Strong*, 2 Conn. 659; *Earp's Will*, 1 Pars. Eq. 468; *Mannings v. Randolph*, 1 Southard, 144; *Waring v. Purcell*, 1 Hill, Eq. 199; *Gheen v. Osborn*, 17 Serg. & R. 171; *McLemore v. Goode*, Harp. Eq. 275.

<sup>4</sup> *Hay v. Palmer*, 2 P. Wms. 531; *Pearly v. Smith*, 3 Atk. 260; *Howell v. Hanforth*, 2 Bl. R. 1016; *Gheen v. Osborn*, 17 Serg. & R. 171. But see *Tracy v. Strong*, 2 Conn. 659; *Fisher v. Fisher*, 4 Am. Law Jour. (N. S.) 539.

<sup>5</sup> *Ante*, § 545, n.; *Earp's Will*, 1 Pars. Eq. 168; 28 Penn. St. 368; *Wilson v. Harman*, 2 Ves. 672; *Rashleigh v. Master*, 3 Bro. Ch. 99. But see *Ex parte Rutledge*, Harp. Eq. 65; *Foote's App.*, 22 Pick. 299; *Moseley v. Eastern R. R. Co.*, 43 N. H. 558; *Granger v. Bassett*, 98 Mass. 462; *Johnson v. Bridgewater*, 14 Gray, 274; *Crawford v. North Eastern Ry.*, 3 K. & J. 744; *Coleman v. Columbia Oil Co.*, 51 Penn. St. 74.

<sup>6</sup> *Earp's Will*, *supra*, *Sweigart v. Berks*, 8 Serg. & R. 299; *Roger's Trust*, 1 Dr. & Sm. 611.

cases by statute, unless the instrument of trust manifests a different intention.<sup>1</sup>

§ 556 a. Where a trustee died largely indebted to his trust estate by a breach of the trust, the income of which trust estate was payable to a tenant for life, and the principal sum went over, and, several years after the trustee's death, a compromise was effected, by which a part of the original sum was received, it was held that, as between the tenant for life and the remainder-man, the sum paid was to be treated as composed of a principal debt due at the date of the transaction out of which the claim originated, or the date of the breach of the trust, and of interest from that day up to the day of the testator's death, and of interest upon said aggregate of principal and interest from the testator's death to the day of settlement and payment; and that the principal sum thus ascertained, and the interest thereon up to the testator's death, were chargeable against the *corpus* of the trust fund, and the interest since the testator's death was to be charged as income.<sup>2</sup> The administrator of a tenant for life can maintain a bill for an account against the trustee for income accruing before the death of the tenant.<sup>3</sup>

<sup>1</sup> Gen. St. c. 97, § 24; *Sohier v. Eldredge*, 103 Mass. 345.

<sup>2</sup> *Maclaren v. Stainton*, L. R. 4 Eq. 448; L. R. 11 Eq. 382; *Turner v. Newport*, 2 Phill. 14; *Cox v. Cox*, L. R. 8 Eq. 343; *In re Grabowski's Settlement*, L. R. 6 Eq. 12.

<sup>3</sup> *Brown v. Hicks*, 30 Ga. 777.

## CHAPTER XIX.

TRUSTS UNDER A WILL FOR THE PAYMENT OF DEBTS; FOR THE  
PAYMENT OF LEGACIES; AND FOR RAISING PORTIONS.

- § 557. Payment of testator's debts at common law and under statutes.
- § 558. The present law of England.
- § 559. The law in the United States as to the payment of a testator's debts.
- §§ 560, 561. The character of trusts under a will for the payment of debts.
- §§ 562-566. The order in which assets are marshalled for the payment of debts, as between heirs, legatees, and devisees.
- § 567. The effect of charging debts upon real estate.
- § 568. Legacies generally payable out of personal property.
- § 569. The effect of charging legacies upon real estate.
- §§ 570-572. When legacies are charged upon real estate.
- § 573. When some legacies are charged upon real estate, and others are not.
- § 574. What amounts to the payment of a legacy so as to discharge the testator's estate.
- § 575. Where legacies bear interest.
- § 576. The charge of a legacy upon real estate follows the land.
- § 577. Trusts for raising portions.
- §§ 578, 579. Whether a portion is to be raised during the life of a tenant for life.
- § 580. The usual forms of drawing settlements at the present time.
- § 581. Powers of trustees to raise portions.
- § 582. At what time portions are to be raised.
- § 583. Where trustees neglect to raise portions as directed.
- § 584. Interest, expenses, and accumulations.

§ 557. At common law, the personal estate only of a deceased person was liable for his debts, unless they were debts by specialty or matter of record. However large his real estate might be, no recourse could be had to it to pay simple-contract debts, although his personal property was utterly insufficient to meet them.<sup>1</sup> The common law has been changed, and it is now provided by statute that copyhold and freehold estates shall be assets for the payment of simple-contract and other debts. The operation of the act is con-

<sup>1</sup> *Kidney v. Coussmaker*, 1 Ves. Jr. 436, Mr. Sumner's notes.

fined to those estates where no provision is made by will for payment of debts, or to those which the person dying has not by his last will charged with, or devised subject to, the payment of his debts.<sup>1</sup>

§ 558. The law in England stands thus: personal estate always has been liable for debts, and is now primarily liable, so far as it will go. All creditors have the right to proceed for payment of their claims out of such personalty, and the deceased person can make no provision, or trust by will, which shall in any way change, alter, postpone, or defeat the rights of creditors in personal property; that is to say, a trust created by will in personal property was and is wholly inoperative in relation to creditors.<sup>2</sup> But real estate, being wholly exempt from simple-contract debts of the deceased person, may be devised in trust for their payment. Courts favored these trusts, for the reason that it was just and equitable that a man's debts should be paid; and if he charged his lands in any way for their payment, or created a trust for that purpose, such trust would be so carried into effect as to answer the purposes for which they were created, and the ends of justice. By the statute above cited, real estate in England is now made assets for the payment of debts; but if the deceased person in his will has charged the whole or a particular part of his real estate, or created a trust in the whole or any part of it, creditors must have recourse to such real estate for the payment of their claims in the manner pointed out in the will.<sup>3</sup> Thus, in England, a trust created by a will in real estate, unlike a trust in chattels, is valid and of controlling effect for the payment of debts. (a)

<sup>1</sup> 3 & 4 Wm. IV. c. 104.

<sup>2</sup> *Evans v. Tweedy*, 1 Beav. 55; *Freake v. Cranefeldt*, 4 Myl. & Cr. 499; *Scott v. Jones*, 4 Cl. & Fin. 398, overruling *Lord Brougham* in same case, 1 R. & M. 255.

<sup>3</sup> *Collis v. Robins*, 1 De G. & Sm. 139; *Hunt v. Bateman*, 10 Ir. Eq. 371; *Francis v. Gower*, 5 Hare, 39; *Young v. Wilton*, 10 Ir. Eq. 10.

(a) See *In re Stephens*, 43 Ch. D. 39, 44.

§ 559. In the United States, both real and personal property are liable for the debts of a deceased person; and no valid trust can be created by will for the payment of debts in either personal or real estate to the injury of the rights of creditors. The statutes of the several States point out how estates shall be administered for the payment of debts. Creditors in all cases have the right to demand payment, according to the provisions of the statutes. Thus trusts, charges, or other directions in wills for the payment of debts have no legal operation, so far as creditors are concerned. If a testator gives to A. his real estate in trust to pay his debts, creditors may still claim that the estate shall be settled in a probate court, and the land sold under a license, and the proceeds applied according to law, and not according to the terms of the will. So absolute is this rule that creditors do not hold the relation of *cestuis que trust* to the trustees, or other persons appointed under a will to apply the property to the payment of debts. It is well understood, that the statute of limitations does not run against a *cestui que trust* so long as the relation of trustee and *cestui que trust* is acknowledged to exist; but a trust or charge in a will upon certain property for the payment of debts creates no such relation, between the trustee and creditor, that the statute of limitations ceases to operate. On the contrary, the claims of a creditor against the estate of a deceased person will be barred by the statute of limitations, notwithstanding certain property is given in trust, or charged with the payment of such claims.<sup>1</sup> (a) The principle is, that the statutes

<sup>1</sup> Carrington v. Manning, 13 Ala. 628; Lewis v. Bacon, 3 Hen. & Mun. 106; Bull v. Bull, 8 B. Mon. 332; Agnew v. Fetterman, 4 Penn. St. 62; Cornish v. Wilson, 6 Gill, 318; Hines v. Spruill, 2 Dev. & Bat. Eq. 93; Man v. Warner, 4 Whart. 455; Jones v. Scott, 4 Cl. & Fin. 398; Freake v. Cranefeldt, 3 Myl. & Cr. 499; Evans v. Tweedy, 1 Beav. 55; Hall v. Bumstead, 20 Pick. 2; Smith v. Porter, 1 Binn. 209; Roosevelt v. Mark, 6 Johns. Ch. 266; Rogers v. Rogers, 3 Wend. 503; Dundas v. Blake, 11 Ir. Eq. 138; Steele v. Steele's Adm'r, 64 Ala. 460.

(a) As to acts showing an election by the creditor, see Fowler v. White v. White, 107 Ala. 417; Bowery S. Bank, 113 N. Y. 450.



having limited the time within which claims against a deceased person's estate must be presented, the mere fact that he designates certain property to pay his debts (which the creditors are not obliged to resort to) shall not avail to prolong the time for presentation of claims. But if the creditors assent to the trust thus created in a will, and an executor settles the estate accordingly, the creditors will be estopped from claiming a legal settlement of the estate; and the executor will become a trustee to settle the estate, as directed in the will and assented to by the creditors.<sup>1</sup> And it is said that a trust thus created to pay debts will prevent the lien of a judgment from expiring without being renewed, unless the creditor has neglected to renew the judgment within the statute period.<sup>2</sup> So it has been held that if a testamentary trustee to pay debts sells the land which he is directed to sell for their payment, and applies the money to the purposes named, the land will be discharged from the lien of the other creditors.<sup>3</sup>

§ 560. But while the creation of a trust by will, in personal or real estate, is wholly without legal operation so far as creditors are concerned, it may be of the utmost consequence, as between heirs, legatees, devisees, and other persons interested in the estate. Thus, where a testator gave two-thirds of a farm and all the stock and property connected with it to a son, in fee, with an express order and direction that the son should pay all his just debts out of the estate so given, and then gave all the residue, both real and personal, to his wife in fee, and made her executrix of the will, the debts not being paid by the son, the creditors brought suits at law against the executrix. The son had sold the farm, but part of the purchase-money had been applied to pay a

<sup>1</sup> *Bank of U. S. v. Beverly*, 1 How. 134.

<sup>2</sup> *Baldy v. Brady*, 15 Penn. St. 111; *Alexander v. McMurry*, 8 Watts, 504; *Trinity Church v. Watson*, 50 Penn. St. 518; *Pettingill v. Pettingill*, 60 Maine, 412. To have this effect, the will must clearly show an intention to create such a trust and to take the estate out of pale of the law. *Steele v. Steele's Adm'r*, 64 Ala. 460.

<sup>3</sup> *Cadbury v. Duval*, 10 Penn. St. 267.

debt due to the purchaser from the son, and part was unpaid, the purchaser having notice of the terms of the bequest to the son. The executrix brought a bill against the son and the purchaser, who had the purchase-money in his hands, to compel the performance of the trust, and the payment of the debts out of the farm thus bequeathed to the son. It was held that the debts were not a mere charge on the devisee, but also a charge on the lands devised.<sup>1</sup>

<sup>1</sup> *Gardner v. Gardner*, 3 Mason, 178. See *Sands v. Champlin*, 1 Story, 376; *In re Butler*, [1894] 3 Ch. 250; *Turner v. Laird*, 68 Conn. 198; *Creesy v. Willis*, 159 Mass. 249; *Mitchell's Estate*, 182 Penn. St. 530; *Hattersley v. Bissett*, 52 N. J. Eq. 693; *Bergman v. Bogda*, 46 Ill. App. 351; *Kelly v. Richardson*, 100 Ala. 584; *Nash v. Ober*, 2 App., D. C. 304; *Deering v. Kerfoot*, 89 Va. 491. Mr. Justice Story said, in *Gardner v. Gardner*: "It remains only to advert to the objection that the present plaintiffs are not competent to maintain the present suit, because they have not yet paid the testator's debts. The argument is, that the creditors alone have a right to maintain a suit to enforce the charge, unless they have been paid by the executrix or the devisees. The right of the creditors to enforce the charge in equity cannot be doubted. *Green v. Lowe*, 3 Bro. Ch. 218. But I am also of the opinion, that the executrix, who, by the law of the State, is responsible for the payment of the debts, where there are real or personal assets, has also a right to enforce the charge. She might procure a license from the proper authority to sell the real estate, upon the deficiency of the personal assets, pursuant to the statute. She might in this way, perhaps, reach the estate charged with the debts, but the remedy would be circuitous, and might be inadequate to all the purposes of equity. She is not compellable to adopt that course; but may directly, by the assistance of a court of equity, reach the fund which, in the eyes of such a court, is appropriated for the payment of the debts. If she can do this after payment of the debts, there is no reason why she may not do it before, since she is entitled to avert an impending mischief, and is not bound to advance her own money to pay the creditors. Besides, the testator has disposed of all his real and personal estate by his will; and the executrix, who is a residuary legatee and devisee, has no right to apply the personal estate bequeathed to other legatees to the payment of the debts where there are other funds appropriated to the purpose; and she has a direct interest to relieve property devised to herself from the burden of the debts. The like remark equally applies to the other plaintiffs, who are devisees exonerated by the will from any contribution or lien. I entertain no doubt, therefore, that the plaintiffs are competent to maintain the present suit. It is the common case of a party subjected to a burden chargeable upon her in law, but from

§ 561. This case of *Gardner v. Gardner*, and Mr. Justice Story's opinion, sufficiently explain the effect of a testator's attempting to create a trust or charge upon a portion of his property for the payment of his debts. Though the creditors may reach the property directly through the executor, and seize that which the testator has charged, or any other property, those of the testator's heirs, legatees, or devisees, who have been disappointed or may be disappointed and deprived of their rights by being compelled to part with the property given to them, may bring a process against the devisee or trustee who has received the property charged with the payment of debts, and compel him to execute the trust imposed upon him, or charged upon the property given to him.

§ 562. The general rule of the English and American courts is, that the personal property of a deceased person is primarily liable for the payment of his debts. It has been seen that, at common law, personal assets were exclusively liable for simple-contract debts. When real estate in England became subject to debts, the same rule applied as was always held in the United States, — that real estate should not be called upon for payment until the personal property was exhausted. This rule extends to the payment of debts secured by mortgage, so that the heir to whom the mortgaged property has descended has a right to call upon the executor to apply the personal assets to the discharge of the mortgage.<sup>1</sup> But if a testator purchases land subject to a

which she is entitled to be relieved in equity by a paramount obligation on another to exonerate her from the whole burden."

<sup>1</sup> *McCampbell v. McCampbell*, 5 Lit. 95; *Wyse v. Smith*, 4 G. & J. 295; *M'Dowell v. Lawless*, 6 Monr. 141; *Haleyburton v. Kershaw*, 3 Des. 105; *Dunlop v. Dunlop*, 4 Des. 305; *Stuart v. Carson*, 1 Des. 500; *Garnet v. Macon*, 6 Call, 608; 2 Brock. 185; *Rogers v. Rogers*, 1 Paige, 188; *Livingston v. Livingston*, 3 Johns. Ch. 148; *Hoye v. Brewer*, 3 G. & J. 153; *Stevens v. Gregg*, 10 G. & J. 143; *Tessier v. Wyse*, 3 Bland, 185; *Lewis v. Thornton*, 6 Munf. 87; *Hawley v. James*, 5 Paige, 318; *Ancaster v. Mayer*, 1 Bro. Ch. 454; *McKay v. Green*, 3 Johns. Ch. 56; *Livingston v. Newkirk*, id. 312; *Stroud v. Barnett*, 3 Dana, 394; *Schemerhorn v.*

mortgage, his personal estate is not bound to pay off and discharge such mortgage, unless an intention to that effect can be gathered from his will.<sup>1</sup>

§ 563. The next fund in order for the payment of debts is that portion of the real estate specially set apart in the will, or charged with, or given in trust for, the payment of debts. Of course, where a testator has indicated what part of his real estate shall be devoted to the payment of debts, it is just and equal between those interested in his estate, aside from creditors, that his will should be carried out. (a) A distinction is drawn between a particular and specific charge upon a particular parcel or portion of land, and a general charge of debts.<sup>2</sup>

§ 564. Next in order for the payment of debts is lands which descend to the heir. There being no intention expressed concerning this land, it comes next after the per-

Barhydt, 9 Paige, 29; Chase v. Lockerman, 11 G. & J. 185; Seaver v. Lewis, 14 Mass. 83; Adams v. Brackett, 4 Met. 280; Gore v. Brazier, 4 Mass. 354; Brydges v. Phillips, 6 Ves. 570; Kelsey v. Western, 2 Comst. 500; Gibson v. McCormick, 10 G. & J. 65; Holman's App., 24 Penn. St. 174; Dandridge v. Minge, 4 Rand. 397; Lupton v. Lupton, 2 Johns. Ch. 614; Morris v. Mowatt, 2 Paige, 587; Mollan v. Griffith, 3 Paige, 402; Hancock v. Minot, 8 Pick. 29; Ruston v. Ruston, 2 Yeates, 54; Todd v. Todd, 1 Serg. & R. 453; Martin v. Frye, 17 Serg. & R. 426; Miller v. Harwell, 3 Murph. 195; McLoud v. Roberts, 4 Hen. & M. 443; Foster v. Crenshaw, 3 Munf. 514; Waring v. Waring, 2 Bland, 673; Marsh v. Marsh, 10 B. Mon. 360; Leavitt v. Wooster, 14 N. H. 551; Sims v. Sims, 2 Stock. Ch. 158; Clinefetter v. Ayers, 16 Ill. 329; Hayes v. Jackson, 6 Mass. 149; 4 Kent, 421; Hewes v. Dehon, 3 Gray, 206.

<sup>1</sup> Andrews v. Bishop, 5 Allen, 490; Cumberland v. Codrington, 2 Johns. Ch. 229, 257, 272; Rogers v. Rogers, 1 Paige, 188; Hewes v. Dehon, 3 Gray, 206, 208.

<sup>2</sup> Manning v. Spooner, 3 Ves. 114; Donne v. Lewis, 3 Bro. Ch. 257; Milnes v. Slater, 8 Ves. 295; Davies v. Topp, 1 Bro. Ch. 524; Powis v. Corbet, 3 Atk. 556; Harmood v. Oglander, 8 Ves. 131; Martin v. Frye, 17 Serg. & R. 426.

(a) Descended estates are to ex- v. Cumberland, L. R. 18 Eq. 578, onerate devised estates from the 583.  
payment of debts and costs. Scott

sonalty, which is always first, and that part of the land which by an express direction is made liable for debts. If these two funds are not sufficient, that part of the testator's land which had descended to his heirs, without any intention whatever expressed in regard to them, must, if necessary, be taken to discharge his debts.<sup>1</sup>

§ 565. The last fund to be resorted to for the payment of debts is land specifically devised, although there may be a general charge of debts upon all the lands. The testator may be supposed to have expressed a particular intention that the specific devisees of land shall have it at any rate, unless all other funds for the payment of his debts have been exhausted, and it is necessary to resort to the specifically devised land, in order that his debts may be paid.<sup>2</sup>

§ 566. Thus the general rule is, that a deceased person's estate is to be applied to the payment of his debts in the following order: (1) The general personal estate; (2) Estates specifically devised for the payment of debts; (3) Estates descended; (4) Estates specifically devised, though charged generally with the payment of debts. And it requires express words, or the clear intent of the testator, to disturb this order.<sup>3</sup> Therefore, while creditors are not gen-

<sup>1</sup> *Oneal v. Mead*, 1 P. Wms. 693; *Cope v. Cope*, 2 Salk. 449; *Howell v. Price*, 1 P. Wms. 291; *White v. White*, 2 Vern. 43; *Johnson v. Milk-sopp*, id. 112; *Evelyn v. Evelyn*, 2 P. Wms. 659; *Gray v. Gray*, 1 Ch. Cas. 296; *Gower v. Mead*, Pr. Ch. 2; *Commonwealth v. Shelby*, 13 Serg. & R. 348; *Warley v. Warley*, 1 Bail. Eq. 398; *Robards v. Wortham*, 2 Dev. Eq. 173; *Livingston v. Livingston*, 3 Johns. Ch. 148.

<sup>2</sup> *Livingston v. Livingston*, 3 Johns. Ch. 148; *Chase v. Lockerman*, 11 G. & J. 186; *Ruston v. Ruston*, 2 Yeates, 54.

<sup>3</sup> *Stephenson v. Heathcote*, 1 Ed. 33; *Inchquin v. French*, 1 Cox, 1; *Webb v. Jones*, id. 245; *Bootle v. Blundell*, 1 Mer. 193; *Barnwell v. Cawdor*, 3 Madd. 453; *Watson v. Brickwood*, 9 Ves. 447; *Livingston v. Newkirk*, 3 Johns. Ch. 312; *Livingston v. Livingston*, id. 148; *Stroud v. Barnett*, 3 Dana. 394; *Warley v. Warley*, 1 Bail. Eq. 397; *Schemerhorn v. Barhydt*, 9 Paige, 29; *Chase v. Lockerman*, 11 G. & J. 185; *Cook v. Dawson*, 29 Beav. 123; *Seaver v. Lewis*, 14 Mass. 83; *Hewes v. Dehon*, 3 Gray, 205; *Plympton v. Fuller*, 11 Allen, 140.

erally confined to this order for the payment of their claims, legal representatives, heirs, legatees, and devisees have rights against each other for relief in case this order is disarranged; for instance, if land, specifically devised, is taken for the payment of debts, the specific devisee may call upon the legal representatives to make up his loss from the personal estate in their hands; if that has been already exhausted, he may call upon the land that was specifically devised for the payment of debts; if that has been applied, he may call upon the heir to whom any portion of the land has descended; if such land has already been taken, then the specific devisees shall contribute ratably to each other.<sup>1</sup> (a)

§ 567. This order of payment or contribution among those interested in an estate is called the marshalling of assets. Of course, it is subject to the will of the testator, for he may direct out of what part of his estate his debts shall be paid; but it requires a direct expression, or a manifest intent, to change this order. It might be supposed, that, if a testator gave away his personal property, and charged his debts upon his real estate, it would be a plain manifestation of an intention to change the order. But such is not the case; for when a testator gives his personal estate, he is supposed to give it subject to the payment of his debts, that being the first fund available for the purpose; and when he charges his real estate with the payment of his debts, he is supposed to charge his real estate with the payment of such debts as may remain unpaid after his personal estate is exhausted. Merely giving away personal estate and charging debts upon the real estate is not inconsistent with the application of the personal estate to the payment of debts, so far as it will go, and of calling upon the real estate only when the personal estate is exhausted. Therefore the rule is, that there must not only be a giving away of the personalty, and a charging

<sup>1</sup> *Livingston v. Livingston*, 3 Johns. Ch. 148; Gen. Stat. Mass. c. 92, §§ 29-36; *Blaney v. Blaney*, 1 Cush. 107.

(a) See 1 Ames on Trusts (2d ed.), 438, n., 444, n.

of debts on the realty, but there must be something further to show that the testator intended to exonerate the whole personality from the payment of the debts, and to charge all the debts upon the realty, and not simply what debts may remain after exhausting the personal estate.<sup>1</sup> (a)

§ 568. Legacies, whether specific or general, are payable out of the personal assets of a testator, and the duty of paying them devolves upon the executor in the due course of his administration. If all the personal assets are exhausted in the payment of debts, specific legatees have a claim for compensation out of some other fund, if in law they have a higher equitable claim in the marshalling of the assets; or for contribution, if they stand upon the same equitable equality. If, however, the personal assets are exhausted in the payment of debts, general legacies must fail, unless the testator has charged the payment of them upon his real estate. If there is a charge for the payment of legacies out of the real estate, the devisee or the heir, as the case may be, will hold the real estate as a trustee for their payment.<sup>2</sup> (b)

<sup>1</sup> *Ancaster v. Mayer*, 1 Bro. Ch. 454; 1 Lead. Cas. Eq. 505, with English and American notes; *Aldrich v. Cooper*, 8 Ves. 382; 2 Lead. Cas. Eq. 56, English and American notes; *Silk v. Prime*, 1 Bro. Ch. 138, n.; 1 Dick. 384, 2 Lead. Cas. Eq. 82, and notes; *Allan v. Gott*, L. R. 4 Ch. 439; *Tench v. Cheese*, 6 De G., M. & G. 453. The purpose of this work, in treating of trusts for the payment of debts, does not call for a more particular statement of the rules that govern the marshalling of assets among all the persons who may call for such marshalling by reason of some interest being taken from them or endangered. The reader will find the cases, both English and American, collected in the notes to the leading cases above referred to, and the rules of law stated and illustrated with a clearness and affluence of learning rarely equalled.

<sup>2</sup> *Stevens v. Gregg*, 10 G. & J. 143.

(a) Mere authority to pay debts does not, it seems, create a charge upon real estate. *In re Head's Trustees*, 45 Ch. D. 310, 315. 200; *Whitehouse v. Cargill*, id. 60; *Dodge v. Hogan*, 19 R. I. 4; *Allen v. Mattison* (R. I.), 39 Atl. 241; *Burns v. Allen*, 35 N. Y. S. 342;

(b) See *M'Carthy v. M'Cartie*, *Jouffret v. Loppin*, 46 id. 810; [1897] 1 Ir. 86; *In re Boards*, [1895] *Pearson v. Wartman*, 80 Md. 528; 1 Ch. 499; *Hill v. Bean*, 86 Maine, *Wentworth v. Read*, 166 Ill. 139;

§ 569. If the trust is created in express words, or if the payment of the legacy is directly charged upon a particular part, or the whole of the real estate, there can be no question as to the trust, or liability of the estate to pay the legacy;<sup>1</sup> but where the trust depends upon the construction to be put upon general words, or upon implication from the use of certain phrases, it has been a question of considerable doubt whether expressions and words sufficient to charge the payment of debts upon real estate are also adequate to charge it with legacies. The ground of the doubt is this, that the payment of debts is a duty, and courts will construe very general and loose expressions into an intention to pay such debts out of the real estate, in case of the failure of the personal estate, but that legacies are mere voluntary gifts, and they will not be charged upon real estate, unless there is a manifest intent to do so.<sup>2</sup> In the late cases, however, the doubt is not referred to, and the general tendency is to charge the real estate with the payment of legacies by the same words that would charge the payment of debts upon real estate.<sup>3</sup> Whether legacies are charged upon lands or

<sup>1</sup> Schnure's App., 70 Penn. St. 400.

<sup>2</sup> Davis v. Gardner, 2 P. Wms. 187, 190; Kightley v. Kightley, 2 Ves. Jr. 328; Williams v. Chitty, 3 id. 551; Kneeling v. Brown, 5 Ves. 362.

<sup>3</sup> Williams v. Chitty, 3 Ves. 551; Trott v. Vernon, Pr. Ch. 430; 1 Vern. 708; Tompkins v. Tompkins, Pr. Ch. 397; Elliot v. Hancock, 2 Vern. 143; Lypet v. Carter, 1 Ves. 499; Ellison v. Airey, 2 Ves. 568;

Sloan's Appeal, 168 Penn. St. 422; Newcomb's Will, 98 Iowa, 175; Price v. Price, 52 N. J. Eq. 326; Jennings v. Sturdevant, 140 Ind. 641; Clark v. Marlow, 149 Ind. 41; Hunt v. Wheeler, 116 N. C. 422; McGlaughlin v. McGlaughlin, 43 W. Va. 226; McQueen v. Lilly, 131 Mo. 9.

A charge of a legacy is to be enforced in equity. Smith v. Jackman (Mich.), 73 N. W. 228.

The conduct of trustees is to be regarded with reference to the facts

existing at the time when they have to act, and their knowledge at that time. They are not insurers, and if they retain assets which, fairly valued, are sufficient to meet legacies which are not payable, but are to be held in trust, they are not personally liable to unpaid legatees, if they pay other legacies payable *pari passu* with them, but not payable immediately. *Re Hurst*; Addison v. Topp, 67 L. T. 96; *In re McIntyre*, 48 N. Y. S. 785.



not is in all cases a matter of intention, to be gathered from the whole will.<sup>1</sup> Thus a mere direction that all debts and legacies are to be paid is not a charge of legacies upon the real estate; nor is a devise of all the rest of his real and personal estate, not before devised, a charge of legacies upon land, — there being no other words tending to show that the legacy is first to be paid from the land. But if real estate is devised, after the payment of debts and legacies, there is no question; for the *residue*, after the payment of the legacies, is devised.<sup>2</sup>

§ 570. Where a testator gives several legacies, and blends both his real and personal estate into one fund for the payment of his debts and legacies, and devises the residue, the legacies are charged upon the real estate, if the personal estate is insufficient to pay both debts and legacies; for a devise of the *residue* can only refer to what is left after satisfying all previous gifts.<sup>3</sup> But whatever may be the disposi-

Mirehouse v. Scaife, 2 Myl. & Cr. 708; Patterson v. Scott, 1 De G., M. & G. 531; Sherman v. Sherman, 4 Allen, 392.

<sup>1</sup> Jones v. Selby, Pr. Ch. 288; Trent v. Trent, 1 Dow, 102; Austen v. Halsey, 6 Ves. 475; Miles v. Leigh, 1 Atk. 574; Minor v. Wicksteed, 3 Bro. Ch. 627; Webb v. Webb, Barn. 86; Dowman v. Rust, 6 Rand. 587; Van Winkle v. Van Houten, 2 Green, Ch. 191; Lupton v. Lupton, 2 Johns. Ch. 618; Paxson v. Potts, 2 Green, Ch. 322; Harris v. Fly, 7 Paige, 421; Logan v. Deshay, 1 Clarke, Ch. 209; Brandt's App., 8 Watts, 198; Wright's App., 12 Pa. St. 256; Ripple v. Ripple, 1 Rawle, 386; Montgomery v. McElroy, 3 Watts & S. 370; Hoes v. Van Hoesen, 1 Comst. 122; Gridley v. Andrews, 8 Conn. 1; Stevens v. Gregg, 10 G. & J. 143; Simmons v. Drury, 2 G. & J. 32.

<sup>2</sup> Ibid.; Newman v. Johnson, 1 Vern. 45; Harris v. Ingledew, 3 P. Wms. 91; Trott v. Vernon, 2 Vern. 708; Bench v. Biles, 4 Madd. 187; Tompkins v. Tompkins, Pr. Ch. 397; Kentish v. Kentish, 3 Bro. Ch. 257.

<sup>3</sup> Cornish v. Willson, 6 Gill, 299; Kirkpatrick v. Rogers, 7 Ired. Eq. 44; Tracy v. Tracy, 15 Barb. 503; Canfield v. Bostwick, 21 Conn. 550; Aubrey v. Middleton, 2 Eq. Cas. Ab. 479; Hassel v. Hassel, 2 Dick. 256; Bright v. Larcher, 3 De G. & J. 148; Kidney v. Coussmaker, 1 Ves. Jr. 436; Bench v. Biles, 4 Madd. 187; Brudenell v. Boughton, 2 Atk. 268; Mirehouse v. Scaife, 2 Myl. & Cr. 695; Cole v. Turner, 4 Russ. 376; Edgell v. Haywood, 3 Atk. 358; Greville v. Brown, 7 H. L. Cas. 689; Field v.

tion made of the property, or however the legacies may be given, there must be a manifest intent, clearly deducible from the will, that legacies are to be paid from the real estate upon failure of the personal estate, or they cannot be charged upon the land.<sup>1</sup> Thus, where the devisee of real estate is appointed executor, and he is expressly directed to pay debts and legacies, he will be held to be a trustee for the legatee, or the land in his hands will be subject to the charge or trust for the debts and legacies.<sup>2</sup> (a) But if land is devised to an executor, and there is no direction to pay legacies, they cannot be charged upon the land in his hands.<sup>3</sup> If, however, the personalty is grossly insufficient to pay the debts and legacies, very slight indications in the will will be laid hold of by the court to raise an implied intention that the executor is to pay the legacies out of the real estate given to him.<sup>4</sup> The use of the word "devise," in giving the legacies, has been relied upon as some evidence that the testator

Peckett, 29 Beav. 568; *Hassanclever v. Tucker*, 2 Binn. 525; *Witman v. Norton*, 6 Binn. 395; *Nichols v. Postlethwaite*, 2 Dall. 131; *McLanahan v. Wyant*, 1 Pa. R. 111; *McGlaughlin v. McGlaughlin*, 24 Pa. St. 22; *Gallagher's App.*, 48 Pa. St. 121; *Adams v. Brackett*, 5 Met. 280; *Dowman v. Rust*, 6 Rand. 587; *Van Winkle v. Van Houten*, 2 Green, Ch. 172; *Carter v. Balfour*, 19 Ala. 815; *Lewis v. Darling*, 16 How. 10; *Buckley v. Buckley*, 11 Barb. 43.

<sup>1</sup> *Adams v. Brackett*, 5 Met. 282; *Lupton v. Lupton*, 2 Johns. Ch. 614; *Stevens v. Gregg*, 10 G. & J. 143; *Gridley v. Andrews*, 8 Conn. 1; and see *Paxson v. Potts*, 2 Green, Ch. 320; *Francis v. Clemow*, 1 Kay, 435; *Wheeler v. Howell*, 3 K. & J. 198; *Gyett v. Williams*, 2 John. & H. 429; *Owing's Case*, 1 Bland, 290.

<sup>2</sup> *Henvell v. Whittaker*, 3 Russ. 343; *Dover v. Gregory*, 10 Sim. 393; *Alcock v. Sparhawk*, 2 Vern. 228; *Doe v. Pratt*, 6 Ad. & El. 180; *Elliot v. Hancock*, 2 Vern. 143; *Cross v. Kennington*, 9 Beav. 150; *Downman v. Rust*, 6 Rand. 587; *Van Winkle v. Van Houten*, 2 Green, Ch. 172. But see *Parker v. Fearnley*, 2 S. & S. 592; *Paxson v. Potts*, 2 Green, Ch. 313; *Nyssen v. Gretton*, 2 Y. & C. Exch. 222.

<sup>3</sup> *Stevens v. Gregg*, 10 G. & J. 143.

<sup>4</sup> *Harris v. Fly*, 7 Paige, 421; *Luckett v. White*, 10 G. & J. 480.

(a) This rule applies whether the executor takes the whole beneficial interest, or only a life estate, or no beneficial interest at all. *Tanqueray v. Willaume*, 20 Ch. D. 465, 476. See *Cunningham v. Parker*, 146 N. Y. 29.

intended to charge them upon his real estate;<sup>1</sup> and so stress has been laid upon the fact that the heir-at-law was appointed residuary legatee, devisee, and executor;<sup>2</sup> and so the fact that the legacy was to a child, or other person whom the testator was under some moral obligation to support, has been considered as some evidence that the testator intended the legacy to be paid out of his real estate, if the personal estate was insufficient.<sup>3</sup>

§ 571. Where there is a general direction given to the executor to pay debts and legacies, he is to pay them out of the personal estate only.<sup>4</sup> If there is a deficiency of personal assets, they must be first applied to the payment of debts, and the legacies fail in the absence of a manifest intention to pay them out of the real estate.<sup>5</sup> Where real estate is devised, subject to the payment of debts and legacies, the real estate is to be resorted to in aid of the personal; and the personal must be first exhausted before the real estate can be called upon, unless there is a plain intention that the personal estate is to be entirely exonerated.<sup>6</sup> (a) There is a

<sup>1</sup> *Trott v. Vernon*, 2 Vern. 708; *Hassel v. Hassel*, 2 Dick. 526.

<sup>2</sup> *Aubrey v. Middleton*, 2 Eq. Cas. Ab. 497; *Alcock v. Sparhawk*, 2 Vern. 238; *Downman v. Rust*, 6 Rand. 587; *Van Winkle v. Van Houten*, 2 Green, Ch. 191.

<sup>3</sup> *Lypet v. Carter*, 1 Ves. 499.

<sup>4</sup> *Parker v. Fearnley*, 2 S. & S. 592; *Warren v. Davies*, 2 Myl. & K. 49.

<sup>5</sup> *Hoover v. Hoover*, 5 Penn. St. 351.

<sup>6</sup> *Amesbury v. Brown*, 1 Ves. 481; *Holford v. Wood*, 4 id. 76; *Hancock v. Minot*, 8 Pick. 29; *Leavitt v. Wooster*, 14 N. H. 550; *Hassanclever v. Tucker*, 2 Binn. 525; *Ruston v. Ruston*, 2 Yeates, 65; *Fenwick v. Chapman*, 9 Pet. 466; *Bank of U. S. v. Beverly*, 1 How. 134; *Lewis v. Darling*, 16 How. 10; *Hoes v. Van Hoesen*, 1 Comst. 122; *Buckley v. Buckley*, 11 Barb. 43; *Chase v. Lockerman*, 11 G. & J. 186.

(a) See *Kilford v. Blaney*, 31 171 Mass. 84; *Yearance v. Powell*, Ch. D. 56; *In re Saunders v. Davies*, 55 N. J. Eq. 577; *Sherman v. Baker*, 34 id. 482; *In re Tunno*, 45 id. 66. (R. I.), 40 Atl. 765.

As to abatement of legacies, see also *In Wilson v. Kenrick*, 31 Ch. D. *White v. Mass. Inst. of Technology*, 658, 661, Chitty, J., said: "1. Where

distinction, however, between a general charge of legacies on land, and a devise of land subject to the payment of a specific sum of money, or upon condition that the devisee pays a certain sum, or in trust to pay a certain sum.<sup>1</sup> In such cases, the gift of the sum is contained in the devise of the land; and such sum is not to come out of the personalty at all, but is confined to the land *exclusively*.<sup>2</sup> There is a great difference between this class of legacies and debts; for debts are a charge upon the personalty at all events, and independent of the will, while general legacies are given by will voluntarily, and are confined to payment out of the personalty, unless an intention can be found in the will to charge them on the real estate upon failure of the personal; but these gifts out of the real estate have no existence except in the gift of the real estate, and can in no event be made a charge upon the personal estate.<sup>3</sup>

§ 572. As the charge of legacies upon real estate is wholly a matter of intention in the testator, it may happen that

<sup>1</sup> Clery's App., 35 Penn. St. 54.

<sup>2</sup> Whaley v. Cox, 2 Eq. Cas. Ab. 549; Amesbury v. Brown, 1 Ves. 481; Noel v. Henley, 7 Price, 241; Phipps v. Annesley, 2 Atk. 57; Wood v. Dudley, 2 Bro. Ch. 316; Holford v. Wood, 4 Ves. 89; Read v. Lichfield, 3 Ves. 479; Fowler v. Willoughby, 2 S. & S. 354; Spurway v. Glynn, 9 Ves. 483; Gitting v. Steele, 1 Swanst. 24; Hoover v. Hoover, 5 Barr, 351; Halliday v. Summerville, 2 Pa. R. 533.

<sup>3</sup> Bickham v. Cruttwell, 3 Myl. & Cr. 763; Noel v. Henley, 7 Price, 241; 2 Jarm. Pow. Dev. 708.

under a power to appoint a definite fund among special objects an appointment is made of aliquot parts of the fund, or of parts of the fund exhausting the whole by one instrument, or by several instruments, which form one transaction and ought to be construed together, there *prima facie* there is no priority, and the several parts of the fund, if the fund proves deficient, must abate ratably. . . . 2. Where, under a like power, several sums are appointed by successive independent deeds, there *prima facie* the sums or parts appointed, not being aliquot parts, have priority according to the dates of the deeds. . . . 3. Where, under a power, an appointment authorized by the power is made reserving a power of appointment and new appointment, and subsequently an instrument of revocation and new appointment is executed, the new appointment operates as an execution of the original power."

some of the legacies given in a will are charged upon the real estate, and some are not. Thus, where a testator devised lands subject to certain legacies mentioned, and then gave *other* legacies, and devised the residue of his lands, it was held by Lord Thurlow, that the last-named legacies were not charged upon the real estate.<sup>1</sup> So the testator may direct that certain portions of his real estate shall be exempt from the payment of legacies, although he charges the legacies generally upon his real estate.<sup>2</sup>

§ 573. If a testator charges some legacies on his land, and leaves others not so charged, and the legacies payable out of the land are paid out of the personal estate, those legacies not payable out of the land have a right to stand in the place of the legacies that were expressly charged upon the land. For although there is generally no marshalling in favor of general legatees or annuitants, yet if legatees who can resort to the real estate exhaust the personal, the legatees who have only the personal shall be subrogated, and their legacies become a charge upon the real estate.<sup>3</sup> So if debts are expressly charged upon real estate, legatees shall be paid out of the personal estate, as against the heir or devisee.<sup>4</sup>

<sup>1</sup> *Howe v. Medcroft*, 1 Bro. Ch. 261; *Masters v. Masters*, 1 P. Wms. 421; *Strong v. Ingraham*, 6 Sim. 197; *Radburn v. Jervis*, 3 Beav. 450. But see *Rooke v. Worrell*, 11 Sim. 216.

<sup>2</sup> *Birmingham v. Kirwin*, 2 Sch. & Lef. 448.

<sup>3</sup> *Hanby v. Roberts*, Amb. 127; *Masters v. Masters*, 1 P. Wms. 421; *Bligh v. Darnley*, 2 id. 619; *Bonner v. Bonner*, 13 Ves. 379.

<sup>4</sup> *Patterson v. Scott*, 1 De G., M. & G. 531; *Conron v. Conron*, 7 H. L. Cas. 168; *Bardwell v. Bardwell*, 10 Pick. 19; *Mollan v. Griffith*, 3 Paige, 402; *Smith v. Wyckoff*, 11 Paige, 49; *Loomis's App.*, 10 Penn. St. 390. *Mirehouse v. Scaife*, 2 Myl. & Cr. 695, is overruled. This rule does not apply, in England, to legacies for charitable purposes, as the statutes of mortmain might thereby be eluded. *Mogg v. Hodges*, 2 Ves. 62; *Williams v. Kershaw*, note to *Hobson v. Blackburn*, 1 Keen, 273; *Philanthropic Soc. v. Kemp*, 4 Beav. 581; *Sturge v. Dimsdale*, 6 Beav. 462; *Robinson v. Geldard*, 3 Mac. & Gor. 735. It is not within the purpose of this work to trace the rules in regard to the marshalling of assets. See *Aldrich v. Cooper*, 2 Lead. Cas. Eq. 56, for an able review of the cases and statement of all the rules; and see *Teas's App.*, 23 Penn. St. 228;

§ 574. Where an executor, who is also appointed trustee for the investment and holding of legacies, has set apart and invested the legacies, he will cease to be executor as to those particular legacies, but will be holden as trustee; and the testator's estate will no longer be holden for the payment of the legacy, if it is afterwards lost.<sup>1</sup> In the United States, it is usual for the executor in such cases to receive an appointment as trustee, and give a bond to the judge of probate for the performance of the trust; but the executor may act as trustee, and the sureties on his bond as executor will be holden for his acts.<sup>2</sup> The estate of the testator will not be holden for any loss, if the executor has clearly set aside any fund as payment of a legacy, although he holds the same in his own hands as trustee for the legatee. If, however, the executor has not settled an account in probate court, and charged off the amount of the legacy paid to him as trustee, he must show some act, such as setting apart and payment, or the legatee will still be entitled to receive the legacy out of the estate of the testator. The mere mental determination of the executor to set aside a certain fund as payment of a legacy, and to hold the same thereafter as trustee, is not sufficient.<sup>3</sup>

§ 575. If the testator names any time for the payment of legacies, they will bear interest from that time. It has already been seen, that the tenant for life is entitled to income upon the estate given for his use, after the expiration of one year from the testator's death, on the ground that the execu-

Miller *v.* Harwell, 3 Murph. 194; Toombs *v.* Roch, 2 Col. C. C. 494; Fleming *v.* Buchanan, 3 De G., M. & G. 976.

<sup>1</sup> Page *v.* Leapingwell, 18 Ves. 463; Jenkins *v.* Wilmot, 1 Beav. 401; Tyson *v.* Jackson, 30 Beav. 384; Byrchall *v.* Bradford, 6 Madd. 13, 235; *Ex parte* Chadwin, 3 Swanst. 380; Philippo *v.* Munnings, 2 Myl. & Cr. 309; Newman *v.* Williams, 10 L. J. (N. S.) Ch. 106.

<sup>2</sup> Dorr *v.* Wainwright, 13 Pick. 388; Brown *v.* Kelsey, 2 Cush. 248; Hubbard *v.* Lloyd, 6 Cush. 524; Prior *v.* Talbot, 10 Cush. 1; Hall *v.* Cushing, 9 Pick. 395.

<sup>3</sup> Miller *v.* Congdon, 14 Gray, 114; Newcomb *v.* Williams, 9 Met. 534; Conkey *v.* Dickinson, 13 Met. 63; *ante*, §§ 263, 281.

tor or trustee has one full year to reduce the estate to possession, and to convert and invest it.<sup>1</sup> So if a testator names no time for the payment of legacies, they will be payable in one year after his death, and will bear interest from that time,<sup>2</sup> unless a contrary intention is shown in the will.

§ 576. Where an express trust is created in lands for the payment of legacies, or they are devised to an executor, trustee, or other person beneficially, and he is to pay the legacies charged, and such trustee, executor, or other person accepts the devise and the trust, he will become personally liable to execute the trusts and pay the legacies.<sup>3</sup> The lands so charged with the trust of paying legacies may be followed into whosoever hands they come; for the title of the devisee or trustee being by will and recorded, purchasers will be charged with constructive notice.<sup>4</sup> A payment of the legacy by the note of the trustee or devisee, and a receipt in full signed by the legatee, will not discharge the lien upon the land, if the legatee cannot collect a judgment on the note against the devisee.<sup>5</sup> This rule, however, would probably be confined to the original parties; for if, after the note and receipt, there should be a sale of the land, a purchaser would not probably be holden. So the statute of limitations will

<sup>1</sup> *Ante*, § 548.

<sup>2</sup> 2 Rop. Leg. 222; 2 Kent, 417; *Hite v. Hite*, 2 Rand. 409; *Birdsall v. Hewlett*, 1 Paige, 32; *Glen v. Fisher*, 6 Johns. Ch. 33; *Trippe v. Frazier*, 4 H. & J. 446; 2 Redf. on Wills, 465-475.

<sup>3</sup> *Lockwood v. Stockholm*, 11 Paige, 387; *Dodge v. Manning*, id. 334; *Bank of United States v. Beverly*, 1 How. 134; *Mahar v. O'Hara*, 4 Gilm. 424; *Solliday v. Gruver*, 7 Penn. St. 452; *Mittenberger v. Schlegel*, id. 241; *Bugbee v. Sargent*, 23 Maine, 269; *Glen v. Fisher*, 6 Johns. Ch. 33; *Larkin v. Mason*, 53 Barb. 267.

<sup>4</sup> *Harris v. Fly*, 7 Paige, 421; *Aston v. Galloway*, 3 Ired. Eq. 126; *Wallington v. Taylor*, Saxton, 314; *Howard v. Chaffee*, 2 Dr. & Sm. 236; *Dodge v. Manning*, 11 Paige, 334; *Mahar v. O'Hara*, 3 Gilm. 424; *Mittenberger v. Schlegel*, 7 Penn. St. 241; *Solliday v. Gruver*, id. 452; *Bank of U. S. v. Beverly*, 1 How. 134; *Hallett v. Hallett*, 2 Paige, 15; *Owing's Case*, 1 Bland, 290; *Kemp v. McPherson*, 7 H. & J. 320; *Phillips v. Gutteridge*, 3 De G., J. & S. 332.

<sup>5</sup> *Terhune v. Colton*, 2 Stockt. 21; *Schanck v. Arrowsmith*, 1 id. 314.

not bar the claim of the legatee or *cestui que trust* to receive his legacy from the devisee or trustee;<sup>1</sup> but the lapse of twenty years will create a presumption of payment.<sup>2</sup>

§ 577. In marriage and family settlements, whether by deed or will, provisions are sometimes inserted that the trustees shall raise portions for children at certain times or upon certain events, as upon their marriage, or arrival at the age of twenty-one. In England, a term of years is generally carved out of the estate, and limited to the trustees to secure the payment of such portions as are directed to be raised. In the United States, it is more usual to direct the portions to be raised from the rents and profits of the estate, or by sale or mortgage of some part of it. These directions are in the nature of charges upon the real estate, and although there may be a covenant in the deed of settlement that the settlor will pay the amount, yet the charge on the real estate is generally the *primary* fund, and the covenants of the settlor or his personal estate are merely auxiliary to the charge upon the land.<sup>3</sup> If the charge or trust is created by will, it is of course to be executed precisely as created, and the land only is liable for the amount to be raised.<sup>4</sup>

§ 578. It sometimes happens, that trustees are directed to hold an estate for the life of parents, for their use, and to pay the parents the rents during their lives, or to permit them to use, occupy, and improve the same; and they are directed to raise portions for the children, to be paid them upon the happening of certain events, as their marriage, or arrival at twenty-one, which events frequently happen during the lifetime of the parents, or tenants for life. Under such direc-

<sup>1</sup> *Watson v. Saul*, 1 Gif. 188.

<sup>2</sup> *Henderson v. Atkins*, 28 L. J. Ch. (N. S.) 913. As to the duty of purchasers to look to the application of the purchase-money of lands sold for the payment of legacies, see chapter upon that subject.

<sup>3</sup> *Lanoy v. Athol*, 2 Atk. 444; *Lechmere v. Charlton*, 15 Ves. 193.

<sup>4</sup> *Burgoyne v. Fox*, 1 Atk. 576; *Edwards v. Freeman*, 2 P. Wms. 437; 1 Story's Eq. Jur. § 575.



tions, very vexatious questions have arisen: whether the trustees are to raise the portions *immediately* on the happening of the event upon which the children are to be paid, or whether the raising of the money should be postponed to the end of the life-estate of the parents. A vast number of conflicting decisions have been made upon this question.<sup>1</sup> In one class of cases, it has been held that the portions should be raised, during the life-estate of the parents, by a sale or mortgage of the reversion;<sup>2</sup> in other cases, that the sale or mortgage should be postponed until the determination of the life-estate.<sup>3</sup> "The raising or not raising will depend upon the particular penning of the trust and the intention of the instrument;"<sup>4</sup> and the court will have no leaning one way or the other.<sup>5</sup>

§ 579. The general rule is now established, that where there is a direction to raise the portion by sale or mortgage, and to pay the same at a particular time or on the happening of a particular event, as on marriage, or at twenty-one, and there is nothing in the will or settlement to indicate a different intention, the portions must be raised by the trustees by an immediate sale or mortgage;<sup>6</sup> but if there are any expres-

<sup>1</sup> 4 Kent, 149, 150 ; 2 Story's Eq. Jur. § 1003.

<sup>2</sup> Hillier v. Jones, 1 Eq. Cas. Ab. 337 ; Smith v. Evans, Amb. 533 ; Mitchell v. Mitchell, 4 Beav. 549 ; Staniforth v. Staniforth, 2 Vern. 460 ; Gerrard v. Gerrard, id. 458 ; Hebblethwaite v. Cartwright, Forr. 30 ; Sandys v. Sandys, 1 P. Wms. 707 ; Codrington v. Foley, 6 Ves. 364 ; Hall v. Carter, 2 Atk. 354 ; Smith v. Foley, 3 Y. & C. 142 ; Mills v. Banks, 3 P. Wms. 9.

<sup>3</sup> Reresby v. Newland, 2 P. Wms. 94 ; 6 Bro. P. C. 75 ; Verney v. Verney, 2 Eden, 25 ; Stanley v. Stanley, 1 Atk. 545 ; Conway v. Conway, 3 Bro. Ch. 267 ; Clinton v. Seymour, 4 Ves. 440 ; Stevens v. Dethick, 3 Atk. 39 ; Wynter v. Bold, 1 S. & S. 507 ; Corbett v. Maydwell, 2 Vern. 640 ; Brome v. Berkley, 2 P. Wms. 484 ; Butler v. Duncomb, 1 id. 448.

<sup>4</sup> Lord Talbot in Hebblethwaite v. Cartwright, Forr. 32, and Lord Eldon in Codrington v. Foley, 6 Ves. 379.

<sup>5</sup> Codrington v. Foley, 6 Ves. 380 ; contrary to Stanley v. Stanley, 1 Atk. 549, and Clinton v. Seymour, 4 Ves. 460, where it was said that the court would lean against the raising.

<sup>6</sup> Codrington v. Foley, 6 Ves. 380.

sions from which it may be inferred that the portions are not to be raised during the continuance of the life-estate of the parents, effect will be given to such expressions. Thus where the parents were to appoint the portions, by deed or *will*,<sup>1</sup> or where the trustee was to raise the portions from and after the end of the life-estate,<sup>2</sup> it was held that these expressions were conclusive that the portions were not to be raised during the lifetime of the parents. The intention must be sought in the instrument only, and no extraneous evidence can be used.<sup>3</sup>

§ 580. At the present day, it is the usual practice to insert in settlements a clause to the effect that portions shall not be raised during the continuance of the life-estate, or during the lifetime of the parents.<sup>4</sup> Upon the happening of the event upon which the portion is payable, the child takes a vested interest in the portion; and if he dies before it is paid, the right to the portion will vest in his representatives, to be paid when the portion is raised. Courts adopt this construction wherever it is possible to sustain it,<sup>5</sup> though they never do violence to the express words of the instrument in order to uphold it.<sup>6</sup> Thus, if it is manifest on the face of the instrument that no child was intended to take a portion unless he survived his parents, the expressed intention will prevail.<sup>7</sup> So, in the case of a voluntary settlement, the children of a deceased child, for whom a portion was to

<sup>1</sup> *Wynter v. Bold*, 1 S. & S. 507. But see *Gough v. Andrews*, 1 Coll. 69.

<sup>2</sup> *Butler v. Duncomb*, 1 P. Wms. 448.

<sup>3</sup> *Corbett v. Maydwell*, 2 Vern. 641.

<sup>4</sup> *Hall v. Carter*, 2 Atk. 356.

<sup>5</sup> *Clayton v. Glengall*, 1 Dr. & W. 1; *Howgrave v. Cartier*, 3 V. & B. 86; *Coop. 66*; *Whatford v. Moore*, 2 Myl. & Cr. 291; *Emperor v. Rolfe*, 1 Ves. 208; *Powis v. Burdett*, 9 Ves. 428; *Frye v. Shelbourne*, 3 Sim. 243; *Combe v. Combe*, 2 Atk. 185; *Hope v. Clifden*, 6 Ves. 499; *Woodcock v. Dorset*, 3 Bro. Ch. 569; *King v. Hake*, 9 Ves. 438.

<sup>6</sup> *Whatford v. Moore*, 7 Sim. 574; 3 Myl. & Cr. 274; *Fitzgerald v. Field*, 1 Russ. 430; *Hotchkin v. Humphrey*, 2 Madd. 65.

<sup>7</sup> *Ibid.*

be raised, will take such portion, and the consideration of love and affection extended to grandchildren will be a sufficient consideration to uphold the settlement, though voluntary, so far as the settlor has placed himself *in loco parentis*.<sup>1</sup> Therefore it is now the usual practice to insert a clause in the settlement to the effect, that such portion shall, or shall not, be payable to such child's representatives in case he dies before his parents, or before the portion is payable to him. (a)

§ 581. If the portions to be raised are effectually charged upon the land, the trustees will take, by implication, the power of selling or mortgaging it for the purpose, although that power is not given to them in the instrument; for that is the most natural way of carrying out the intention of the parties in raising the portions.<sup>2</sup> Even where the trust is to raise the portion from rents and profits, if a *particular time* is named for the payment so near that it is impossible to raise the sum before the appointed time, it will be considered that it was inconsistent that the settlor intended that the whole sum should be raised from the annual rents and profits, and a mortgage or sale will be ordered.<sup>3</sup> (b) So if the direc-

<sup>1</sup> *Swallow v. Binns*, 1 K. & J. 417; 19 Jur. 843; *Henderson v. Kennicott*, 12 Jur. 848; *Jones v. Jones*, 13 Sim. 568; *Evans v. Scott*, 1 Cl. & Fin. (N. S.) 57.

<sup>2</sup> *Backhouse v. Middleton*, 1 Ch. Cas. 175; *Sheldon v. Dormer*, 2 Vern. 310; *Ashton v. —*, 10 Mod. 401; *Maynel v. Massey*, 2 Vern. 1.

<sup>3</sup> *Sheldon v. Dormer*, 2 Vern. 310; *Okeden v. Okeden*, 1 Atk. 551; *Backhouse v. Middleton*, 1 Ch. Cas. 175; *Allan v. Backhouse*, 2 V. & B. 65.

(a) In construing a marriage settlement, there is a presumption that the settlor, in providing for his unborn children, intends that their portions shall become vested at twenty-one or marriage. *Wakefield v. Maffett*, 10 A. C. 422, 435. The rule that that construction is to be favored which will give portions to all of a class of children who may

live to require them, applies both to settlements and to wills. *In re Knowles*, 21 Ch. D. 806.

(b) A direction in a will to pay debts out of rents and profits of realty *prima facie* charges the debts on the corpus. *Metcalfe v. Hutchinson*, 1 Ch. D. 591; *In re Green*, 40 id. 610. See *Wethered v. Safe Deposit Co.*, 79 Md. 153.

tions to the trustees are to raise the portions "as soon as conveniently may be," or "as soon as possible."<sup>1</sup> The rule has been carried to the extent, that where the trustees were directed to raise a gross sum for portions from the *rents and profits*, and there were no words restricting the authority to *annual* rents and profits, they have been held to be authorized to raise the required sum at once by sale or mortgage.<sup>2</sup> The intention of the settlor, however, must prevail, and if the portions are to be raised from *annual* rents and profits, or if any words are used implying such an intention, there can be no sale or mortgage.<sup>3</sup> In cases where the portions are to be raised from rents and profits, and a power of sale or mortgage is also given by implication or in express words, the rents and profits must first be applied so far as they will go, in order to sell as small a part of the estate as possible.<sup>4</sup> The trustees may also raise portions by selling the wood and timber upon an estate, or the minerals and mines may be worked for the raising of portions.<sup>5</sup>

§ 582. If a *gross* sum is directed to be raised for the portions of several children, to be paid at twenty-one or any other appointed time, and the shares of each are vested, though not payable, the gross sum should be raised as soon as the first portion becomes payable;<sup>6</sup> and the portions not then payable should be invested in the securities allowed by law, or in safe securities, where there are no investments pointed out by

<sup>1</sup> *Trafford v. Ashton*, 2 P. Wms. 416 ; *Ashton v. —*, 10 Mod. 401 ; *Bloom v. Waldron*, 3 Hill, 367.

<sup>2</sup> *Ivy v. Gilbert*, 2 P. Wms. 19 ; *Evelyn v. Evelyn*, id. 669 ; *Baines v. Dixon*, 1 Ves. 42 ; *Green v. Belcher*, 1 Atk. 505 ; *Shrewsbury v. Shrewsbury*, 1 Ves. Jr. 234 ; *Warburton v. Warburton*, 2 Vern. 420 ; *Mills v. Banks*, 3 P. Wms. 7 ; *Hall v. Carter*, 2 Atk. 358 ; *Anon.* 1 Vern. 104 ; *Schermerhorne v. Schermerhorne*, 6 Johns. Ch. 70 ; 1 Story's Eq. Jur., § 1063 *et seq.*

<sup>3</sup> *Garmstone v. Gaunt*, 9 Jur. 78.

<sup>4</sup> *Okeden v. Okeden*, 1 Atk. 552 ; *Warter v. Hutchinson*, 1 S. & S. 276 ; *Hall v. Carter*, 2 Atk. 358.

<sup>5</sup> *Offley v. Offley*, Pr. Ch. 27.

<sup>6</sup> *Gillbrand v. Goold*, 5 Sim. 149.

statutes or orders of court. It is not a proper administration to incumber an estate with as many different mortgages as there are portions, when one gross sum is directed to be raised.<sup>1</sup> But if *several distinct sums* are directed to be raised and paid at different times, the several portions cannot be raised until they become payable; and if the trustees raise them before, and lose or misapply the money, the land would still be liable to the charge, although some of the portions were payable.<sup>2</sup>

§ 583. Where trustees are directed to apply the rents and profits of an estate for a certain period to the maintenance and education of children or other persons, such direction will constitute a charge upon the estate in the hands of the trustees.<sup>3</sup> If the trustees are directed to raise a portion or portions out of the rents and profits, at or before a certain time, and they suffer the term to expire without raising the portions, the court can direct them to be raised out of the rents and profits on hand, or it can order those persons to whom such rents and profits have been distributed, to refund or contribute to the raising of the portions.<sup>4</sup>

§ 584. Interest is payable upon portions from and after the time named for their payment, although nothing is said in the settlement upon that subject.<sup>5</sup> If, however, there are any provisions in the will or settlement upon the subject of interest, or for the payment of any particular sum in place

<sup>1</sup> Ibid.

<sup>2</sup> *Dickenson v. Dickenson*, 3 Bro. Ch. 19; *Breedon v. Breedon*, 1 R. & M. 413; *Sowarsby v. Lacy*, 4 Madd. 142; *Lavender v. Stanton*, 6 Madd. 46.

<sup>3</sup> *Robinson v. Townshend*, 3 G. & J. 413; *Fox v. Phelps*, 17 Wend. 393; 20 Wend. 437.

<sup>4</sup> *Hawley v. James*, 5 Paige, 318.

<sup>5</sup> *Beal v. Beal*, Pr. Ch. 405; *Bagenal v. Bagenal*, 6 Bro. P. C. 81; *Roseberry v. Taylor*, id. 43; *Hall v. Carter*, 2 Atk. 358; *Pomfret v. Winsor*, 2 Ves. 472; *Boycott v. Cotton*, 1 Atk. 552; *Leech v. Leech*, 2 Dr. & W. 568, overruling *Hays v. Bayley*, 3 Sugd. V. & P. (10th ed.); *Guillam v. Holland*, 2 Atk. 343; *Trimlestown v. Colt*, 1 Ves. Sr. 277.

of interest, such provisions must be carried into effect.<sup>1</sup> So the directions of the settlement must be followed in relation to the expenses of raising the portions; but if there are no such directions, the expenses must be paid out of the estate.<sup>2</sup> Trusts for accumulations to raise portions for children are specially excepted from the operation of the Thellusson Act,<sup>3</sup> (a) so called, regulating trusts for accumulation; but such trusts are not excepted in the statutes of New York<sup>4</sup> and Pennsylvania<sup>5</sup> against accumulations.

<sup>1</sup> *Clayton v. Glengall*, 1 Dr. & W. 1; *Boycott v. Cotton*, 1 Atk. 553; *Mitchell v. Bower*, 3 Ves. 286.

<sup>2</sup> *Mitchell v. Mitchell*, 4 Beav. 549.

<sup>3</sup> 39 & 40 Geo. III. c. 98; *Edwards v. Tuck*, 3 De G., M. & G. 40; *Barrington v. Liddell*, 2 De G., M. & G. 480; *Jones v. Maggs*, 9 Hare, 605; *Evans v. Hellier*, 5 Cl. & Fin. 114; *Burt v. Sturt*, 10 Hare, 415; *Beech v. Vincent*, 3 De G. & Sm. 678; 19 L. J. Ch. 131; *Morgan v. Morgan*, 20 L. J. Ch. 109; *Halford v. Stains*, 16 Sim. 488.

<sup>4</sup> R. S. pt. 2, tit. 2, c. 1, art. 1, § 37.

<sup>5</sup> *Purd. L.* 507; 1853, April 18, § 9.

(a) See *Re Walker*, 54 L. T. 792; *supra*, § 394.

## CHAPTER XX.

### TRUSTS UNDER ASSIGNMENTS FOR CREDITORS; TRUSTS UNDER DEEDS FOR PARTICULAR CREDITORS; AND TRUSTS UNDER POWER OF SALE MORTGAGES.

- § 585. Trusts for creditors, and assignment to them of beneficial interests.
- § 586. Whether preferences can be made in such trusts.
- § 587. Whether these trusts are void as fraudulent under the bankrupt laws.
- § 588. A corporation may create a trust for its creditors.
- § 589. The manner of creating a trust for creditors.
- § 590. Whether a trust for creditors is fraudulent or not under the statutes against fraudulent conveyances.
- §§ 591, 592. What acts and conditions will make such a trust fraudulent and void.
- § 593. Where such trusts are revocable by the debtor.
- § 594. After notice and acceptance of the trust, creditors may enforce it.
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- § 596. As to liens upon the trust property and rights of the trustees.
- § 597. The trustees must proceed according to the deed of trust.
- § 598. Powers of the trustees under deeds of assignment.
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- § 602 c. The equity of redemption and powers of sale.
- § 602 d. Deeds of trust and power of sale mortgages.
- § 602 e. Form and execution of deeds of trust.
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- § 602 g. Powers of trustees under deeds of trust and power of sale mortgages depend entirely upon the contract.
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Deeds of trust and mortgages with power of sale, *continued*.

- § 602 *q*. Whether the sale may be public or private, and the form of notice.
- § 602 *r*. Notice must be certain as to time and place of sale.
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- § 602 *u*. Sale may be adjourned, and notice.
- § 602 *v*. Those having the power of sale cannot purchase unless specially authorized by the power.
- § 602 *w*. Effect of a purchase by the trustee or mortgagee.
- § 602 *x*. Effect of a sale under a power, what rights it bars.
- § 602 *y*. Whether the sale may be in lots or in a mass.
- § 602 *z*. Whether the sale will be set aside for inadequacy of price.
- § 602 *aa*. Effect of a sale under an irregular exercise of the power.
- § 602 *bb*. What a sale under the regular exercise of the power passes, and the rights of the parties.
- § 602 *cc*. If the sale is not regular, the equity of redemption is not barred.
- § 602 *dd*. Irregularities in the execution of the power of sale may be waived by the party for whose benefit it is created.
- § 602 *ee*. When courts may enjoin the sale.
- § 602 *ff*. How the trustee or mortgagor executes his trust after a sale.
- § 602 *gg*. Mortgages with power of sale may be foreclosed in any other legal manner.

§ 585. A DEBTOR may convey or assign both his real and personal estate to trustees for the payment of his debts; and such trust may be limited to the payment of one particular debt due to the trustees<sup>1</sup> or some third person,<sup>2</sup> or of several debts specified in the deed or schedule annexed to it.<sup>3</sup> This trust may be extended generally for the benefit of all the debtor's or grantor's creditors,<sup>4</sup> or to all who execute the deed or otherwise assent thereto.<sup>5</sup> (a) The trust may be

<sup>1</sup> Foster v. Latham, 21 Ill. App. 165.

<sup>2</sup> Page v. Broom, 4 Russ. 6; De Wol v. Chapin, 4 Pick. 59; Cooper v. Whitney, 3 Hill, 95; Chaplin v. Maglaughlin, 65 Penn. St. 492.

<sup>3</sup> Boazman v. Johnson, 3 Sim. 377; Hamilton v. Houghton, 2 Bligh, 169; Garrard v. Lauderdale, 3 Sim. 1; Walwyn v. Coutts, 3 Mer. 707; 3 Sim. 14; Shirly v. Ferrers, 1 Bro. Ch. 41; Purefoy v. Purefoy, 1 Vern. 28.

<sup>4</sup> Carr v. Burlington, 1 P. Wms. 228; Boswell v. Parker, 2 Ves. 364; Hinde v. Blake, 3 Beav. 234; Acton v. Woodgate, 2 Myl. & K. 492.

<sup>5</sup> Dunch v. Kent, 1 Vern. 260; *Ex parte* Richardson, 14 Ves. 184; Spottiswoode v. Stockdale, Coop. 102; Hatch v. Smith, 5 Mass. 42.

(a) This topic is not now of practical importance, as such assignments are voidable and an act of bankruptcy under a general bankruptcy law. See Bump on Bank-

ruptcy (10th ed.), pp. 403, 421, 729, 846; Lowell on Bankruptcy, and Burrill on Assignments, *passim*; *infra*, §§ 587, 593, note (a).



further limited to pay equally without distinction;<sup>1</sup> or at common law, it may be limited to make certain priorities and preferences in the payments.<sup>2</sup> The deed may direct the debts to be paid in full,<sup>3</sup> or a certain proportion or composition may be determined to be paid.<sup>4</sup> The deed may contain a trust for creditors, and also a settlement upon a wife and children.<sup>5</sup> An arrangement of this kind, fairly made by a contract with the creditors, or accepted or acted upon by them, is valid and binding upon all parties;<sup>6</sup> even a creditor not concurring but only standing by and without objection seeing the trustee act, under the trust may be bound by tacit acquiescence;<sup>7</sup> and courts will enjoin or restrain any act in violation of this trust by any of the parties.<sup>8</sup> Such a trust deed for the payment of debts is favorably regarded in equity; and it will be supported, if possible, without regard to the strict technicalities of the law;<sup>9</sup> as, where a party, with power of leasing in possession, made a lease to commence in the future, in trust for the payment of his debts, or where a party covenanted to stand seized of land to the use of an-

<sup>1</sup> Carr v. Burlington, 1 P. Wms. 228.

<sup>2</sup> Lanning v. Lanning, 2 Green, Ch. 228; McColghan v. Hopkins, 17 Md. 395; Purefoy v. Purefoy, 1 Vern. 28; Cunningham v. Freeborn, 11 Wend. 241; Stevenson v. Agry, 7 Ham. (2d pt.) 247; Pearson v. Rockhill, 4 B. Mon. 296; Niolon v. Douglas, 2 Hill, Ch. 443; Moffatt v. McDowall, 1 McCord, Ch. 434; Tompkins v. Wheeler, 16 Pet. 106; McCollough v. Sommerville, 8 Leigh, 415; Hickley v. Farmers' & Mech. Bank, 5 Gill & J. 377; Williams v. Brown, 4 Johns. Ch. 427; Brashear v. West, 7 Pet. 608; Spring v. South Carolina Ins. Co., 8 Wheat. 268; Hatch v. Smith, 5 Mass. 42; Stevens v. Bell, 6 Mass. 339; Lippincott v. Barker, 2 Bin. 174; Wilkes v. Ferris, 8 Johns. 335; Rankin v. Loder, 2 Ala. 380; How v. Camp, Walk. Ch. 427; Holbrook v. Allen, 4 Fla. 87.

<sup>3</sup> Ibid.

<sup>4</sup> Stephenson v. Hayward, Pr. Ch. 310; Tatlock v. Smith, 6 Bing. 339; Constantein v. Blache, 1 Cox, 287; Vernon v. Morton, 8 Dana, 247.

<sup>5</sup> Johnson v. Malcomb, 6 Jones, Eq. 120.

<sup>6</sup> Small v. Marwood, 9 B. & Cr. 300.

<sup>7</sup> Condict v. Flower, 106 Ill. 105.

<sup>8</sup> Spottiswoode v. Stockdale, Coop. 102; Mackenzie v. Mackenzie, 16 Ves. 372; Ex parte Sadler, 15 Ves. 52; Beck v. Parker, 65 Pa. St. 262.

<sup>9</sup> Dunch v. Kent, 1 Vern. 260; Spottiswoode v. Stockdale, Coop. 102; Turner v. Jaycox, 40 Barb. 164.

other, in consideration of his paying the debts of the covenantor out of the profits of the land, the transactions were upheld in equity as trusts for the payment of debts, though they would not have been good at law.<sup>1</sup> In such a deed the recital of debts raises a presumption of indebtedness, but it may be rebutted.<sup>2</sup> Where one creates a trust, making himself the *cestui* for life, and then assigns his beneficial interest as security for debt, he cannot, as against the creditor, subsequently alter the terms of the trust so as to make the payment of the income discretionary with the trustee.<sup>3</sup>

§ 586. At common law, an insolvent debtor has the right to prefer any of his creditors. He may prefer one to all, or all to one, for the reason that it is not illegal to pay debts; and as creditors may sue and obtain judgment, and levy executions, each one for himself, and obtain as much advantage as possible by gaining priority of time, so the debtor may voluntarily do what each one of his creditors may do by law, that is, obtain a preference.<sup>4</sup> But in many of the States, as Maine, New Hampshire, Massachusetts,<sup>5</sup> Connecticut, New Jersey, Pennsylvania, Ohio, Iowa, and Georgia, preferences are abolished by statute, and all debts owing to those who become parties to the assignment must be paid equally, and no preferences can be made except of those debts which, by the laws of the United States and of the State, must be paid in full.<sup>6</sup> In all those States which had a State system of insolvent or bankrupt laws, an assignment of all a debtor's property, giving preferences to some creditors, was an act of insolvency or bankruptcy, and was fraudulent and void. Under the bankrupt law of the United States now in force, all conveyances and assignments made within six months of

<sup>1</sup> Pollard v. Greenville, 1 Ch. Cas. 10; Lord Paget's Case, 1 Leon. 194;  
<sup>4</sup> Cruise, Dig. tit. 32, c. 9, §§ 25, 26.

<sup>2</sup> Graham v. Anderson, 42 Ill. 514.

<sup>3</sup> Pacific Nat'l Bk. v. Windram, 133 Mass. 175.

<sup>4</sup> Ante, § 585, and cases cited.

<sup>5</sup> Stat. 1836, c. 238, § 3.

<sup>6</sup> Thomas v. Jenkes, 1 Am. Lead. Cas. 74.

filing a petition of bankruptcy, which give a preference to any creditor, are fraudulent and void, if the debtor knows himself to be insolvent, and there is an intent to prefer.<sup>1</sup> Substantially the same provisions are enacted in the English statutes of bankruptcy.<sup>2</sup> In some of the States preferences are prohibited, and an assignment containing a preference is fraudulent and void; but in others, as in Ohio and Pennsylvania, the assignment is not void, but the provision only containing the preference is void, and the assignment enures to all creditors equally in proportion to their demands:<sup>3</sup> but if the assignment is in trust for such creditors as release, no releasing creditors are excluded.<sup>4</sup> In States where preferences have not been prohibited by statute, courts lean strongly against them, and will not support them if they can be avoided for any good reason.<sup>5</sup> But these statutes against preferences apply only to general assignments, and not to *bona fide* sales to a creditor to pay a valid debt, or partial assignments for particular purposes.<sup>6</sup> While the general bankrupt law is in force, assignments will be infrequent; but, as they may still be made, a general outline of the law only will be stated.

§ 587. If a debtor assigns his whole property, he becomes insolvent and bankrupt. The bankrupt laws require a bankrupt's estate to be under the control of commissioners or assignees appointed by and amenable to a court of law, and not under the control of persons appointed by the debtor.<sup>7</sup>

<sup>1</sup> Stat. 1867, March 2, §§ 81, 82, 83.

<sup>2</sup> 24 & 25 Vict. c. 134.

<sup>3</sup> *Law v. Mills*, 18 Penn. St. 185; *Wiener v. Davis*, id. 331; *Hulls v. Jeffrey*, 8 Ohio, 390; *Harshman v. Lowe*, 9 id. 92; *Wilcox v. Kellogg*, 11 id. 394; *Mitchell v. Gazzam*, 12 id. 315.

<sup>4</sup> *Lea's App.*, 9 Barr, 504.

<sup>5</sup> *Boardman v. Halliday*, 10 Paige, 224; *Cram v. Mitchell*, 1 Sandf. 251; *Webb v. Daggett*, 2 Barb. 10; *Nicholson v. Leavitt*, 4 Sandf. 279.

<sup>6</sup> *McWhorter v. Wright*, 5 Ga. 555; *Bates v. Coe*, 10 Conn. 281; *Mer. Man. Co. v. Smith*, 8 N. H. 347; *Beard v. Kimball*, 11 N. H. 471; *Barker v. Hall*, 13 N. H. 298; *Henshaw v. Sumner*, 23 Pick. 446.

<sup>7</sup> *Dutton v. Morrison*, 17 Ves. 199; *Worsley v. Demattos*, 1 Burr. 476;

Therefore every general assignment is an act of bankruptcy; if there are preferences, it is a fraud upon the other creditors.<sup>1</sup> (a) If it is an assignment for an equal distribution, it is a fraud upon the policy of the law.<sup>2</sup> Such deed will be fraudulent and an act of bankruptcy, although it contains a proviso that it shall be void if the trustees think fit, or a proviso that, if the creditor or creditors to a certain amount do not execute within a certain time, a decree of bankruptcy shall be entered; or if the trustees did not accept the deed or intend to act; or if the trustees induced the debtor to execute the deed.<sup>3</sup> The same general principles prevail in the United States under the national bankrupt law. A general assignment for the benefit of creditors is an act of bankruptcy, and so is the sale or mortgage of a stock of goods or property out of the usual and ordinary course of the debtor's business.<sup>4</sup> But, in order to avoid the deed of assignment, there must be a debt due at the time of its execution;<sup>5</sup> and the deed, though voidable by creditors and assignees in bankruptcy, is good between the parties themselves.<sup>6</sup>

§ 588. A corporation has the same right as a natural person to make assignments for the benefit of its creditors;<sup>7</sup> *Simpson v. Sikes*, 6 M. & S. 312; *Hobson v. Markson*, 1 Dillon, 420; *In re Burt*, id. 439.

<sup>1</sup> *Wilson v. Day*, 2 Burr. 827; *Alderson v. Temple*, 4 Burr. 2240; *Lewin on Trusts*, 375 (5th ed.).

<sup>2</sup> *Kettle v. Hammond*, 1 Cook's B. L. 108; *Tappenden v. Burgess*, 4 East, 239; *Lewin on Trusts*, 375.

<sup>3</sup> *Tappenden v. Burgess*, 4 East, 230; *Back v. Gooch*, 4 Camp. 232; *Holt*, 13; *Dutton v. Morrison*, 17 Ves. 193; *Lewin on Trusts*, 376.

<sup>4</sup> See *Brightly's Annotated Bankrupt Law of the United States*, pp. 72-74, 78-80, and the cases cited by him.

<sup>5</sup> *Ex parte Taylor*, 5 De G., M. & G. 392; *Ex parte Louch*, 1 De G. 612; *Oswald v. Thompson*, 2 Exch. 215.

<sup>6</sup> *Bessey v. Windham*, 6 Q. B. 166.

<sup>7</sup> *Catlin v. Eagle Bank*, 6 Conn. 233; *Savings Bank v. Bates*, id. 506;

(a) See *infra*, § 593, n. The fact that a trust is voluntary is no objection to its enforcement, except where the rights of creditors are concerned. *Ray v. Simmons*, 11 R. I. 236; *Reiff v. Horst*, 52 Md. 255; *Webb's Estate*, 49 Cal. 541.

and it may make preferences among its creditors<sup>1</sup> though grave doubts have been raised whether it can do anything but make an equal division of its property among its creditors in case of insolvency.<sup>2</sup> A general assignment by a corporation of all the property with which it does its business is a good cause for taking away its charter and ending its existence.<sup>3</sup>

§ 589. No formalities are required in an assignment in trust for creditors, if the instrument is so constructed that the intention of the parties can be inferred from it.<sup>4</sup> In those States where there are statutes regulating such assignments, the instrument must be substantially according to the statute: thus a lease reserving rent in trust for creditors may be an assignment;<sup>5</sup> and a power of attorney to collect money and pay it to creditors, in an order named, is an assignment;<sup>6</sup> and a letter sent to an absent creditor, assigning personal property for the benefit of himself and other creditors, is valid as an assignment.<sup>7</sup> But an assignment directly to creditors to pay their own debts does not come within the rules respecting assignments in trust, although the surplus

*Dana v. Bank of the United States*, 5 Watts & S. 224; *Hopkins v. Gallatin Turnpike*, 4 Humph. 403; *Tower v. Bank of River Raisin*, 2 Doug. 530; App. 12; 6 Humph. 532; *State of Maryland v. Bank of Maryland*, 6 Gill & J. 205; *Bank of U. S. v. Huth*, 4 B. Mon. 423; *Ex parte Conway*, 4 Pike, 305; *Ringo v. R. E. Bank*, 13 Ark. 575; *Arthur v. Commercial, &c. Bank of Vicksburg*, 9 Sm. & M. 396; *De Ruyter v. St. Peter's Church*, 3 Barb. Ch. 119; 3 Comst. 238; *Union Bank of Tennessee v. Ellicott*, 6 Gill & J. 363. In New York a corporation has no such right. *Loring v. United States Co.*, 30 Barb. 644.

<sup>1</sup> *Ibid.*

<sup>2</sup> *Robins v. Embry*, 1 Sm. & M. Ch. 207; *Montgomery v. Commercial Bank*, id. 632; *Bean v. Bullis*, 57 Penn. St. 221.

<sup>3</sup> *State v. Real Estate Bank*, 5 Pike, 596.

<sup>4</sup> *Harvey v. Mix*, 24 Conn. 406.

<sup>5</sup> *Lucas v. Sunbury & Erie R. R. Co.*, 32 Penn. St. 458; *Bittenger v. R. R. Co.*, 40 id. 269.

<sup>6</sup> *Watson v. Bagaley*, 12 Penn. St. 164.

<sup>7</sup> *Dargan v. Richardson*, 1 Cheves, L. 197; *Shubar v. Winding*, id. 218.

may go to the debtor.<sup>1</sup> Nor is a judgment confessed to a creditor in trust an assignment;<sup>2</sup> nor is a mortgage in trust to pay debts, with or without a power of sale, an assignment.<sup>3</sup>

§ 590. A conveyance of all a debtor's property in trust, for the payment of all or any number of his creditors, is not within the statute of 13 Eliz. c. 5, or 29 Eliz. c. 5, which makes void all conveyances made to hinder, delay, or defraud creditors; although the assignment may operate to change the rights of a creditor, and may result in delaying him.<sup>4</sup> But all such assignments will be void if affected by *actual fraud*:<sup>5</sup> as if the purpose is to hinder, delay, and defraud the creditors,<sup>6</sup> or any one or more of them;<sup>7</sup> or if a fictitious debt is preferred;<sup>8</sup> or there is the reservation of a power of revoking the assignment, or the reservation of any other right and power which gives the debtor the control of the property;<sup>9</sup> or if a clause is introduced which exempts the assignees from the ordinary duties affixed by law to the office of assignee, as that the assignees shall not be liable for

<sup>1</sup> Henderson's App., 31 Penn. St. 502; Chaffees v. Risk, 24 id. 432; Vallance v. Miners' Life Ins. Co., 42 id. 441.

<sup>2</sup> Guy v. McIlree, 26 Penn. St. 92; Lord v. Fisher, 19 Ind. 7.

<sup>3</sup> Barker v. Hall, 13 N. H. 298; Manuf. and Mech. Bank v. Bank of Pa., 7 Watts & S. 335; Harkrader v. Leiby, 4 Ohio St. 602.

<sup>4</sup> Meux v. Howell, 4 East, 9; Estwick v. Callaud, 5 T. R. 424; Wilt v. Franklin, 1 Binn. 514.

<sup>5</sup> Twyne's Case, 3 Co. 80 a; Dutton v. Morrison, 17 Ves. 197; Wilson v. Day, 2 Burr. 827; Hungerford v. Earle, 2 Vern. 261; Tarback v. Marbury, id. 510; Pickstock v. Lyster, 3 M. & S. 371; Law v. Skinner, W. Black. 996; Stone v. Grantham, 2 Buls. 218; Worsley v. Demattos, 1 Burr. 467; Wilson v. Gray, 2 Stock. 233; Jessup v. Hulse, 29 Barb. 539; Gazzam v. Poyntz, 4 Ala. 374.

<sup>6</sup> Sheldon v. Dodge, 4 Denio, 218; Bodley v. Goodrich, 7 How. 277; Hart v. McFarland, 13 Penn. St. 185.

<sup>7</sup> Knight v. Packer, 1 Beasley, 214.

<sup>8</sup> Waters v. Comly, 3 Harr. 117; Webb v. Daggett, 2 Barb. 10; Planck v. Schermerhorn, 3 Barb. Ch. 644; Irwin v. Keen, 3 Whar. 347. But if a creditor extinguishes his claim by fraud, his share goes into the residue for the other creditors. Hardcastle v. Fisher, 24 Mo. 70.

<sup>9</sup> Whallon v. Scott, 10 Watts, 237; Riggs v. Murray, 2 Johns. Ch. 565; 15 Johns. 571; Grover v. Wakeman, 11 Wend. 187.

any loss not happening from their own gross negligence or misfeasance.<sup>1</sup> So the selection of a sick, weak, or incapable assignee, or of one at a distance from the locality, or of an insolvent person, or of one of such moral or pecuniary character as to evince a purpose on the part of the debtor to keep the control of the property, or to render it unprofitable to the creditors, will be strong evidence of fraud in fact, and will avoid the assignment.<sup>2</sup> The postponement, for an unreasonable length of time, of the sale of the property, and of the settlement of the accounts and payment of the creditors by the trustees, is evidence of fraud.<sup>3</sup> So is the assignment of property which, on the face of the paper, the assignee is not authorized to distribute.<sup>4</sup> So any unusual powers given to the trustees that may prejudice the claims of the creditors and favor the debtor, will render the settlement fraudulent; as a power given to the trustees to compound with the credi-

<sup>1</sup> *Litchfield v. White*, 3 Sandf. Ch. 547; *Olmstead v. Herrick*, 1 E. D. Smith, 310; *Hutchinson v. Lord*, 1 Wis. 286.

<sup>2</sup> *Currie v. Hart*, 2 Sandf. Ch. 251; *Reede v. Emery*, 8 Paige, 417; *Connah v. Sedgwick*, 1 Barb. 211; *Cram v. Mitchell*, 1 Sandf. 251; *Hayes v. Doane*, 3 Stock. 84.

<sup>3</sup> *Adlum v. Yard*, 1 Rawle, 163; *Mitchell v. Beal*, 8 Yerg 134. Three years is an unreasonably long time. *Adlum v. Yard*, *ut supra*. The length of time which will be reasonable depends upon the nature and situation of the property. *Hafner v. Irwin*, 1 Ired. L. 490; *Hardy v. Skinner*, 9 id. 191; *Browning v. Hart*, 6 Barb. 91; *Robins v. Embry*, 1 Sm. & M. Ch. 205; *Rundlett v. Dale*, 10 N. H. 458; *Hardy v. Simpson*, 13 Ired. L. 138; *Grover v. Wakeman*, 11 Wend. 187; *Bennett v. Union Bank*, 5 Humph. 612; *Farmers' Bank v. Douglass*, 11 Sm. & M. 472; *Arthur v. Com. & Railw. Bank of Vicksburg*, 9 Sm. & M. 396; *Henderson v. Downing*, 24 Miss. 119. A year's suspension was deemed fraudulent in one case. *Ward v. Trotter*, 3 Mon. 1; *Johnson v. Thweatt*, 18 Ala. 745. In Pennsylvania a year was deemed a proper time, and a longer time was deemed fraudulent. *Sheener v. Lautzerbeizer*, 6 Watts, 543; *Dana v. Bank of U. S.*, 5 Watts & S. 224; *Abercrombie v. Bradford*, 16 Ala. 560; *Hodge v. Wyatt*, 10 Ala. 271; *Hindman v. Dill*, 11 Ala. 689; *Lockhart v. Wyatt*, 10 Ala. 231. Three months in most cases would not be unreasonably long. *Christopher v. Covington*, 2 B. Mon. 357. But if the trustee may use his own discretion, it is void. *D'Invernois v. Leavitt*, 23 Barb. 63.

<sup>4</sup> *Hooper v. Tuckerman*, 3 Sandf. 316.

tors, or a right reserved either to the grantor or trustee to make preferences or to alter them.<sup>1</sup> In some States a power to sell on credit is considered evidence of fraud;<sup>2</sup> and so is a power to mortgage, or lease, or incumber the estate.<sup>3</sup> The trust may be to sell at either public or private sale.<sup>4</sup>

§ 591. So the reservation of a use or benefit to the grantor will render a general assignment void. It is a settled principle that a reservation to the grantor or his family, or to

<sup>1</sup> *Wakeman v. Grover*, 4 Paige, 24; 11 Wend. 187; *Hudson v. Maze*, 3 Scam. 579; *Sheldon v. Dodge*, 4 Denio, 218; *Mitchell v. Stiles*, 13 Penn. St. 306; *Barnum v. Hempstead*, 7 Paige, 569; *Boardman v. Halliday*, 10 Paige, 224; *Strong v. Skinner*, 4 Barb. 547; *Averill v. Loucks*, 6 Barb. 471; *Gazzam v. Poyntz*, 4 Ala. 374; *D'Invernois v. Leavitt*, 23 Barb. 63. But the assignees may compromise claims due to the debtor. *White v. Monsarrat*, 18 B. Mon. 809; *Dow v. Platner*, 16 N. Y. 562; *Robins v. Embury*, 1 Sm. & M. Ch. 207; *Bellows v. Partridge*, 19 Barb. 176; *Meacham v. Sternes*, 9 Paige, 398.

<sup>2</sup> *Mussey v. Noyes*, 26 Vt. 426; *Sutton v. Hanford*, 11 Mich. 513; *Pierce v. Brewster*, 32 Ill. 268; *Page v. Olcott*, 28 Vt. 465; *Barney v. Griffin*, 2 Comst. 366; *Nicholson v. Leavitt*, 2 Seld. 510, overruling 4 Sandf. 366; *Billings v. Billings*, 1 Cal. 113; *Swoyer's App.*, 5 Penn. St. 317; *Estate of Davis*, 5 Whart. 530; *Kellogg v. Slauson*, 1 Kern. 305; *American Exch. Bank v. Inloes*, 7 Md. 380; *Porter v. Williams*, 5 Seld. 142; *Hutchinson v. Lord*, 1 Wis. 286; *Keep v. Sanderson*, 2 Wis. 42; *Booth v. McNair*, 11 Mich. 19; *Mower v. Hanford*, 6 Minn. 535. In other States a power to sell on credit is good. *Grinell v. Adams*, 11 Humph. 85; *Shackleford v. Bank of Mobile*, 2 Ala. 238; *Abercrombie v. Bradford*, 16 Ala. 560; *Neally v. Ambrose*, 21 Pick. 185; *Hopkins v. Ray*, 1 Met. 79. A power to convert the estate into money, in such convenient time as to the assignees should seem meet, is a power to sell on credit, and is void. *Woodburn v. Mosher*, 9 Barb. 255; *Murphy v. Bell*, 8 How. Pr. Cas. 468. So a power to complete the manufacture of stock in such manner as, in the judgment of the assignees, to obtain the most money, was void. *Dunham v. Waterman*, 17 N. Y. 9. But to sell for the best interests of the parties is not a power to sell on credit. *Whitney v. Krows*, 11 Barb. 200; *Kellogg v. Slauson*, 1 Kern. 302; *Maennel v. Murdock*, 13 Md. 164; *Clark v. Fuller*, 21 Barb. 128; *Nichols v. McEwen*, 21 id. 65; *Ely v. Hair*, 16 B. Mon. 230. If there is no power in the assignment to sell on credit, but the trustee sells on credit, the assignment is not void. *Small v. Ludlow*, 20 N. Y. 155.

<sup>3</sup> *Planck v. Schermerhorn*, 3 Barb. Ch. 644; *Barnum v. Hempstead*, 7 Paige, 568.

<sup>4</sup> *Bellows v. Partridge*, 19 Barb. 176.



any one not a creditor, of any trust, profit, or benefit out of the property, or of a credit on account of any part of it, or of any control by the grantor,<sup>1</sup> is a fraud in law, and avoids the whole assignment.<sup>2</sup> So a stipulation that the grantor should retain the possession avoids the assignment.<sup>3</sup> But in many States the possession by the assignor of the property after the assignment is only evidence, more or less stringent, of fraud under the circumstances of each case, and may be explained.<sup>4</sup> A stipulation for the maintenance of the grantor or his family, or that the grantor shall be employed to manage and dispose of the property at a fixed salary,<sup>5</sup> or the reservation of a fixed sum of money, or of so much a year, avoids the assignment.<sup>6</sup> An express reservation of the sur-

<sup>1</sup> *Smith v. Conkwright*, 28 Minn. 23.

<sup>2</sup> *Thomas v. Jenks*, 1 Amer. Lead. Cas. 69; *Mackie v. Cairns*, 5 Cow. 549; *Jackson v. Parker*, 9 Cow. 73; *Byrd v. Bradley*, 2 B. Mon. 239; *Kissam v. Edmundson*, 1 Ired. Eq. 180; *Goodrich v. Downs*, 6 Hill, 438; *Farmer v. Lesley*, 6 Penn. St. 121; *Shaffer v. Watkins*, 7 Watts & S. 219; *Leadman v. Harris*, 3 Dev. 144; *Mead v. Phillips*, 1 Sandf. 83; *Anderson v. Fuller*, 1 McMul. Eq. 27; *McAllister v. Marshall*, 6 Binn. 338; *Peacock v. Tompkins*, Meigs, 317; *Austin v. Johnson*, 7 Humph. 191.

<sup>3</sup> *Twyne's Case*, 3 Co. 80 b; 1 Smith Lead. Cas. 1, and notes; *Dewey v. Adams*, 4 Edw. Ch. 21; *Connah v. Sedgwick*, 1 Barb. 210; *Rogers v. Vail*, 16 Vt. 329; *Caldwell v. Williams*, 1 Cart. 405.

<sup>4</sup> In Massachusetts, such stipulations are not fraudulent. *Baxter v. Wheeler*, 9 Pick. 21; *Foster v. Saco Manuf. Co.*, 12 Pick. 451. If the assignment is good on its face, it is not void for an illegal act done afterwards, as the assignor's carrying away a bag of \$5,000 in gold, unless the assignment was executed with a fraudulent intent. *Wilson v. Forsyth*, 24 Barb. 105. Perhaps, in most States, the retention of the possession by the assignor is only evidence of fraud, and not in itself fraud. *Brooks v. Marbury*, 11 Wheat. 82; *Vernon v. Morton*, 8 Dana, 247; *Pike v. Bacon*, 8 Shep. 280; *Osborne v. Fuller*, 14 Conn. 530; *Strong v. Carrier*, 17 Conn. 239; *Klapp v. Shurk*, 13 Penn. St. 589; *Fitler v. Maitland*, 5 Watts & S. 307; *Dallam v. Fitler*, 6 Watts & S. 323; *Dewey v. Littlejohn*, 2 Ired. Eq. 495; *Christopher v. Covington*, 2 B. Mon. 357; *Hardy v. Skinner*, 9 Ired. L. 191; *Ravisies v. Allston*, 5 Ala. 297; *Darwin v. Handley*, 3 Yer. 502; *Barker v. Hall*, 13 N. H. 298; *Shackleford v. Bank of Mobile*, 22 Ala. 238; *Lockhart v. Wyatt*, 10 Ala. 231.

<sup>5</sup> *Johnson v. Harvey*, 2 Pen. & Watts, 82; *McClug v. Lecky*, 3 Pen. & Watts, 83; *Henderson v. Downing*, 24 Mis. 117.

<sup>6</sup> *Mackie v. Cairns*, 5 Cow. 549; *Butler v. Van Wyck*, 1 Hill, 463;

plus to the grantor, upon a partial assignment for a portion of the creditors, renders the assignment void.<sup>1</sup> So it is said that an express reservation of the surplus in a general assignment renders it void.<sup>2</sup> On the other hand, it has been held that the reservation of the surplus, after paying all the creditors, is only what the law implies, and is therefore not void.<sup>3</sup> But all secret reservations are fraudulent.<sup>4</sup> If the assignor secretly, and without the knowledge of the general creditors, pays extra money, or gives a special advantage to some particular creditor to procure his assent to the assignment, or to secure his influence with the other creditors in gaining their assent or discharge, such assignment will be illegal and void, as a fraud upon the general creditors; and if the general creditors have signed a release of their claims,

*Goodrich v. Downs*, 6 Hill, 440, overruling *Riggs v. Murray*, 2 Johns. Ch. 565, 15 Johns. 571, and *Austin v. Bell*, 20 Johns. 442; *Harris v. Sumner*, 2 Pick. 129; *Richards v. Hazzards*, 1 Stew. & Por. 139. A reservation of so much as is allowed by law avoids the deed in *Tennessee*, *Sugg v. Tillman*, 2 Swanst. 210; but not in *Pennsylvania*, *Mulford v. Shurk*, 28 Pa. St. 473. But the courts will be governed by circumstances and the intent of the parties, in determining whether certain reservations are fraudulent, as if the sum is small and reasonable. *Canal Bank v. Cox*, 6 Maine, 395; *Skipwith v. Cunningham*, 8 Leigh, 272; *Kevan v. Branch*, 1 Grat. 275. The trustees may employ the assignor, at reasonable compensation, to assist in disposing of the property. *Shattuck v. Freeman*, 1 Met. 10; *Vernon v. Morton*, 8 Dana, 247; *Pearson v. Rockhill*, 4 B. Mon. 296; *Bank of Mobile v. Clark*, 7 Ala. 765; *Jones v. Whitbread*, 11 C. B. 406; *Fitler v. Maitland*, 5 Watts & S. 307; *Nicholson v. Leavitt*, 4 Sandf. 270; *Mulford v. Shurk*, 28 Penn. St. 473. So the trustees may employ other agents in managing the property. *Hennessey v. Western Bank*, 6 Watts & S. 300; *Kelly v. Lank*, 7 B. Mon. 220; *Coates v. Williams*, 7 Exch. 208; *Peck v. Whiting*, 21 Conn. 206. The trustee may act and convey by attorney. *Blight v. Schenck*, 10 Penn. St. 285; *Maennel v. Murdock*, 13 Md. 164; *Gillespie v. Smith*, 22 Ill. 473.

<sup>1</sup> *Doremus v. Lewis*, 8 Barb. 124; *Suidam v. Martin*, Wright, 698; *Goodrich v. Downs*, 6 Hill, 438; *Strong v. Skinner*, 4 Barb. 547; *Cole v. Jessup*, id. 307; *Griffin v. Barney*, 2 Comst. 365; *Leitch v. Hollister*, 4 Comst. 214; *Dana v. Lull*, 17 Vt. 390.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Hall v. Denison*, 17 Vt. 311; *Ely v. Cook*, 18 Barb. 612; *Beatty v. Davis*, 9 Gill, 213; *Rahn v. McElrath*, 6 Watts, 151; *Hindman v. Dill*, 11 Ala. 689; *Austin v. Johnson*, 7 Humph. 191.

<sup>4</sup> *M'Cullock v. Hutchinson*, 7 Watts, 434; *Smith v. Lowell*, 6 N. H. 67; *Smith v. Smith*, 11 N. H. 460.

such release will be no bar to an action against the debtor.<sup>1</sup> If such creditor has taken notes or other securities from the debtor, as an extra consideration for assenting to such assignment, such notes and securities are void.<sup>2</sup> A deed may be fraudulent by reason of delaying creditors in the collection of their debts; but a conveyance for the benefit of creditors cannot be impeached for fraud by a creditor who assents with knowledge of the facts;<sup>3</sup> otherwise as to one who, though present at the proceedings and expressing no dissent, yet took no part and gave no assent.<sup>4</sup>

§ 592. A condition in a deed of assignment, requiring the creditors to release the assignor from all claims before receiving any benefit under the deed, the surplus returning to the debtor and not to the non-releasing creditors, renders the deed fraudulent and void; and such a stipulation, as a condition of preference, although the only effect is to postpone the non-releasing creditors to a share of the surplus, renders the assignment void. The principle is, that although preferences are allowed, yet the appropriation of the property to the creditors must be absolute and unconditional, and a trust which coerces the creditors into a relinquishment of part of their claims, in order to enjoy any benefit under the deed, is fraudulent and void, although no portion of the surplus may go to the grantor.<sup>5</sup> An assignment to a trustee of *part* of a

<sup>1</sup> *Mare v. Sandford*, 1 Gif. 288; *Case v. Gerrish*, 15 Pick. 50; *Ramsdell v. Edgerton*, 8 Met. 227; *Lothrop v. King*, 8 Cush. 382; *Partridge v. Messer*, 14 Gray, 180.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Greene v. Sprague Manuf. Co.*, 52 Conn. 330.

<sup>4</sup> *Waterman v. Sprague Manuf. Co.*, 55 Conn. 554.

<sup>5</sup> *Doe v. Scribner*, 41 Maine, 277; *Owen v. Arvis*, 2 Dutch. 23; *Miller v. Conklin*, 17 Ga. 430; *Goddard v. Hapgood*, 25 Vt. 351; *Green v. Trieber*, 3 Md. 13; *Hyslop v. Clarke*, 14 Johns. 458; *Austin v. Bell*, 20 Johns. 442; *Wakeman v. Grover*, 4 Paige, 24; 11 Wend. 187; *Goodrich v. Downs*, 6 Hill, 438; *Hafner v. Irwin*, 1 Ired. L. 490; *Robins v. Embry*, 1 Sm. & M. Ch. 208; *Whallom v. Scott*, 10 Watts, 237; *Hastings v. Belknap*, 1 Denio, 197; *Atkinson v. Jordan*, 5 Ham. 293; *Woolsey v. Verner*, Wright, 606; *Barrett v. Reids*, id. 701; *Brown v. Knox*, 6 Mo. 302; *Drake v. Rogers*, id. 317; *Ingraham v. Wheeler*, 6 Conn. 277; *Howell v. Edgar*, 3 Scam. 417; *Ramsdell v. Sigerson*, 2 Gill, 78; *Swearingin v.*

debtor's property, on condition of a full release, is fraudulent everywhere.<sup>1</sup> A void assignment may be remedied by an additional assignment,<sup>2</sup> but it cannot be helped by parol evidence.<sup>3</sup>

§ 593. In England, a voluntary assignment to a trustee for creditors, not communicated to them, and they not being parties thereto and privy to its execution, conveys a mere power or agency to the trustees, which may be altered or revoked at the will of the assignor. (a) The creditors,

*Slicer*, 5 Mo. 241; *The Watchman*, Ware, 232; *Todd v. Buckman*, 2 Fairf. 41; *Pearson v. Crosby*, 23 Maine, 261; *Hurd v. Silsbee*, 10 N. H. 108; *Jacot v. Corbett*, 1 Cheves, Ch. 71; *Grimshaw v. Walker*, 12 Ala. 101; *Brown v. Lyon*, 17 Ala. 659; *West v. Snodgrass*, id. 549; *Fox v. Adams*, 5 Maine, 245; *Ashurst v. Martin*, 9 Porter, 567; *McCall v. Hinkley*, 4 Gill, 129. In the early cases in Alabama, such a condition was held not to vitiate the assignment. *Gazzam v. Poyntz*, 4 Ala. 374; *Wiswall v. Ticknor*, 6 Ala. 179. In Pennsylvania, Virginia, South Carolina, Massachusetts, and Rhode Island, such conditions have been held to be good, and not to vitiate the deeds of assignments. *Lippincott v. Barker*, 2 Binn. 174; *Livingston v. Ball*, 3 Watts, 198; *Bayne v. Wylie*, 10 Watts, 309; *Mechanics' Bank v. Gorman*, 8 Watts & S. 304; *Pierpont v. Graham*, 4 Wash. 232; *Skipwith v. Cunningham*, 8 Leigh, 272; *Kevan v. Branch*, 1 Grat. 275; *Niolon v. Douglas*, 2 Hill, Ch. 443; *Le Prince v. Guillemont*, 1 Rich. Eq. 187; *Brashear v. West*, 7 Pet. 609; *Dana v. Bank of U. S.*, 5 Watts & S. 224; *Borden v. Sumner*, 4 Pick. 265; *Andrew v. Ludlow*, 5 Pick. 28; *Nostrand v. Atwood*, 19 Pick. 281; *Canal Bank v. Cox*, 6 Maine, 395; *Curtis v. Leavitt*, 15 N. Y. 9; *Halsey v. Whitney*, 4 Mason, 207. A release by a separate deed, not part of the assignment, does not avoid the assignment. *Renard v. Graydon*, 39 Barb. 548; *Nightingale v. Harris*, 6 R. I. 321; *Livermore v. Jenckes*, 21 How. 126.

<sup>1</sup> *Seaving v. Brinkerhoff*, 5 Johns. Ch. 329; *Skipwith v. Cunningham*, 8 Leigh, 272; *Le Prince v. Guillemont*, 1 Rich. Eq. 187; *Jacot v. Corbett*, 1 Cheves, Ch. 71. This question was left open in *Nostrand v. Atwood*, 19 Pick. 284; *Fassit v. Phillips*, 4 Whart. 399; *Thomas v. Jenks*, 5 Rawle, 221; 1 Am. Lead. Cas. 70; *Hennessey v. Western Bank*, 6 Watts & S. 301; *Sangston v. Gaither*, 3 Md. 41; *Greene v. Trieber*, id. 11.

<sup>2</sup> *Merrill v. Englesby*, 2 Vt. 150.

<sup>3</sup> *Inloes v. American Ex. Bank*, 11 Ind. 173; *Groschen v. Page*, 6 Cal. 138; *Hampstead v. Johnston*, 18 Ark. 123.

(a) In England the rule is, as debtor, minded to provide for his stated by Kekewich, J., in *Priestley creditors*, and to that intent vesting *v. Ellis*, [1897] 1 Ch. 489, 500: "A the property in another with direc-

though named in the deed, cannot enforce the trust against the assignor or trustee;<sup>1</sup> but it is said that the communica-

<sup>1</sup> *La Touch v. Lacom*, 7 Cl. & Fin. 772; *Walwyn v. Coutts*, 3 Mer. 707; 3 Sim. 14; *Page v. Broom*, 4 Russ. 6; *Garrard v. Lauderdale*, 3 Sim. 1;

tions to apply it in payment of his debts, does not thereby constitute an irrevocable trust, at all events during his life. The trustee is only his agent for effecting his wishes, and is responsible only to him." It is there held also that under § 47 of the Bankruptcy Act, 1883, a voluntary settlement is void against the settler's trustee in bankruptcy only from the time when his title accrues, and not from its date. *In re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776, overruling *In re Briggs and Spicer*, [1891] 2 Ch. 127. See *In re Poppleton and Jones' Contract*, 74 L. T. 582. An assignment for creditors is revocable, though an assignment for particular persons is irrevocable. *New v. Hunting*, [1897] 2 Q. B. 19.

In Massachusetts, an assignment for all creditors who sign it within one month is void as a preference under the insolvency act, though harmonizing with its requirements. *Steel Edge S. & R. Co. v. Manchester S. Bank*, 163 Mass. 252. But see *contra*, when there is no actual fraud, *Pfaff v. Prag*, 79 Md. 369. See also 8 Harv. L. Rev. 265. The assignee in insolvency can avoid the assignment, either on the ground that it constituted a preference to the creditors assenting to it, or was made with a view to hinder or delay the operation and effect of the laws relating to insolvency, or to prevent the property from coming to the

debtor's assignee in insolvency. *Cunningham v. Seavey*, 171 Mass. 341. In Illinois, an estate voluntarily assigned cannot be used to procure the assent of a majority of the creditors by buying up their claims, and be subsequently applied to payment for such assent, and a discontinuance be thus procured where there is no restoration of the estate to the debtor except in form, but it is put beyond the reach of creditors not assenting. *American Exchange Bank v. Walker*, 164 Ill. 135, 140.

On March 14, 1899, Judge Lowell, in the U. S. District Court of Massachusetts, decided in *Romanow v. Fringold*, that creditors, who become parties to a general assignment of their debtor for the benefit of creditors, cannot afterwards file an involuntary petition in court asking that he be adjudged a bankrupt; that by accepting the assignment the creditors released their claims under the assignment; and that, though the assignment is an act of bankruptcy, and is avoided by adjudication, yet it is not a void, but only voidable, and is valid until the adjudication; and that those who have become voluntary parties to the assignment and have thus agreed to a settlement of the respondents' affairs thereunder, cannot equitably repudiate their agreement. See *Scott v. Devlin*, 89 F. R. 970; *In re Gutwillig*, 90 id. 481; *In re Curtis*, 91 id. 737.

tion of the trust by the trustees to the creditors takes away the power to revoke it,<sup>1</sup> and if the trustees have made payments or advances, they are entitled to possession of the property until they are reimbursed.<sup>2</sup> If the deed declares that it shall be void unless executed by all the creditors within a certain time, yet it is not void in equity if the creditors accept and act under it, though it is not signed by them.<sup>3</sup> And even though one of the trustees does not sign the deed, it is good at law as well as in equity.<sup>4</sup> If the deed

2 R. & M. 451; *Bill v. Cureton*, 2 Myl. & K. 511; *Simmonds v. Pallas*, 2 Jo. & Lat. 8 Ir. Eq. 335, 489; *Griffiths v. Ricketts*, 7 Hare, 307; *Siggers v. Evans*, 22 Eng. L. & Eq. 139; *Nicholson v. Tutin*, 2 K. & J. 18; *Wilding v. Richards*, 1 Col. C. C. 659; *Kirwan v. Daniel*, 5 Hare, 499; *Evans v. Bagwell*, 2 Con. & Law. 616; 4 Dru. & War. 398; *Brown v. Cavendish*, 1 Jo. & Lat. 635; *Synnot v. Simpson*, 5 H. L. Cas. 141.

<sup>1</sup> *Acton v. Woodgate*, 2 Myl. & K. 495.

<sup>2</sup> *Hind v. Blake*, 3 Beav. 234.

<sup>3</sup> *Spottiswood v. Stockdale*, Coop. 104; *Dunch v. Kent*, 1 Vern. 260; *Whitmore v. Turquand*, 3 De G., F. & J. 110; *Re Baber*, L. R. 10 Eq. 554. The creditor must put himself in the same relation as if he had signed the deed. *Forbes v. Limond*, 4 De G., M. & G. 298. And within the time fixed, if there is a limit of time within which he must execute the assignment, or assent thereto. *Halsey v. Whitney*, 4 Mason, 206; *Aston v. Woodgate*, 2 Myl. & K. 492; *Phoenix Bank v. Sullivan*, 9 Pick. 410; *De Caters v. Chaumont*, 9 Paige, 490. The creditors are not necessarily excluded if they do not come in within the prescribed time, as they may show reasons why they should not be excluded. See cases before cited. *Tennant v. Stoney*, 1 Rich. Eq. 222; *Hosack v. Rogers*, 6 Paige, 415; *Nicholson v. Tutin*, 2 K. & J. 18; *Watson v. Knight*, 19 Beav. 369; *Pierpont v. Graham*, 4 Wash. C. C. 232; *Stoddart v. Allen*, 1 Rawle, 258; *Dedham Bank v. Richards*, 2 Met. 105; *Furman v. Fisher*, 4 Cold. 626. But if the time within which creditors are to come in is unreasonably short, the assignment will be fraudulent and void. *Brashear v. West*, 7 Pet. 609; *Vaughn v. Evans*, 1 Hill, Ch. 414; *Vernon v. Morton*, 8 Dana, 447; *Skipwith v. Cunningham*, 8 Leigh, 272; *Biron v. Mount*, 24 Beav. 642; *Lancaster v. Elce*, 31 id. 325. If a *third party* conveys property in trust for a debtor's liabilities, only those creditors can avail themselves of the fund who come strictly within the terms of the trust, and execute the assignment and comply with all its conditions. *Williams v. Moslyn*, 33 L. J. Ch. 54.

<sup>4</sup> *Small v. Marwood*, 9 B. & Cr. 360; *Good v. Cheesman*, 2 B. & Ad. 328.

itself declares that it is made for those *only* who *become parties* to it, only those who become parties can claim anything under it;<sup>1</sup> though it has been held that they need not sign it, if they perform all its conditions, and take no step inconsistent with it.<sup>2</sup> In the United States the rule is different. If an assignment, not fraudulent, is made to trustees for the benefit of creditors, their assent is not necessary; or their assent will be presumed in all cases, if it is for their benefit, and contains no unusual clauses or restrictions.<sup>3</sup> A debtor cannot revoke the assignment where the property has vested in the trustees, or the creditors have had notice of it, or any of the trusts have been performed.<sup>4</sup> The English rule prevailed in Massachusetts before the court had jurisdiction in equity over such assignments;<sup>5</sup> but after the Act of 1836, c. 238, the assent of creditors was not necessary.<sup>6</sup> If the conveyance is made *directly to the creditors*, in consideration of the debts due them, their assent to the conveyance is necessary; but it may be presumed under some circumstances.<sup>7</sup>

<sup>1</sup> Garrard v. Lauderdale, 3 Sim. 1; Balfour v. Welland, 16 Ves. 151.

<sup>2</sup> Field v. Donoughmore, 1 Dr. & War. 227.

<sup>3</sup> Nicoll v. Mumford, 4 Johns. Ch. 523; Cunningham v. Freeborn, 11 Wend. 241; Houston v. Nowland, 7 Gill & J. 480; Bank of U. S. v. Huth, 4 B. Mon. 423; Smith v. Leavitt, 10 Ala. 93; Kinnard v. Thompson, 12 Ala. 487; Governor, &c. v. Campbell, 17 Al. 566; Rankin v. Duryer, 21 Ala. 392; Klapp v. Shurk, 13 Penn. St. 539; Harland v. Binks, 15 Ad. & E. (N. S.) 721; Brooks v. Marbury, 11 Wheat. 78; Brown v. Minturn, 2 Gall. 557; Wheeler v. Sumner, 4 Mason, 183; Halsey v. Whitney, id. 206; New England Bank v. Lewis, 8 Pick. 113; Ward v. Lewis, 4 Pick. 518; North v. Turner, 9 Serg. & R. 244; Wiley v. Collins, 2 Fairf. 193; Wilt v. Franklin, 1 Binn. 502; Reinhard v. Bank of Kentucky, 6 B. Mon. 252; Moses v. Murgatroyd, 1 Johns. Ch. 129; Neilson v. Blight, 1 Johns. Cas. 205; Weston v. Barker, 12 id. 281; 4 Kent, 307; Marigny v. Remy, 15 Martin, 607; Gray v. Hill, 10 Serg. & R. 436; De Forrest v. Bacon, 2 Conn. 633; Rankin v. Lodor, 21 Ala. 380; Stewart v. Hall, 3 B. Mon. 218.

<sup>4</sup> Robinson v. Sublett, 6 Humph. 313; Lawrence v. Davis, 3 McLean, 177; Petriken v. Davis, 1 Morris, 296.

<sup>5</sup> Russell v. Woodward, 10 Pick. 408; Stephens v. Bell, 6 Mass. 339; Widgery v. Haskell, 5 Mass. 144.

<sup>6</sup> Shattuck v. Freeman, 1 Met. 10.

<sup>7</sup> Tompkins v. Wheeler, 16 Pet. 106; Nicoll v. Mumford, 4 Johns. Ch. 522.

If the assignment is made to a trustee not present, his assent will be presumed; and the deed will take effect from its delivery, subject to be defeated by the refusal of the trustee.<sup>1</sup> But if there is any doubt concerning the trustee's acceptance, all liens put upon the property during such delay, and before the trustee actually accepts, will take preference of the deed of assignment.<sup>2</sup>

§ 594. As soon as an assignee accepts a general assignment for the payment of debts to creditors, either directly or by implication, he becomes a trustee for them; and, as soon as they have notice, they may compel the execution of the trust in a court of equity.<sup>3</sup> Failure of the trustee to execute the trust within the time named in the deed will not divest the rights of the beneficiaries. The court may remove the trustee or compel him to do his duty.<sup>4</sup> But the assignment must be accepted according to its terms, and within the time named.<sup>5</sup> In bringing a bill to seek the benefit of such an assignment, all the creditors must join in the suit, or one may sue in behalf of the others, who may come in and join him. Such bill must be brought for the enforcement of the trust generally, and for a sale of the property, the settlement of the accounts, and the payment of all the debts: a decree for the payment of a single debt would be erroneous.<sup>6</sup>

<sup>1</sup> *Wilt v. Franklin*, 1 Binn. 502; *McKinney v. Rhoades*, 5 Watts, 343; *Skipwith v. Cunningham*, 8 Leigh, 272; *Merrill v. Swift*, 18 Conn. 257; *Ward v. Lewis*, 4 Pick. 518; *Moore v. Collins*, 3 Dev. 126; *Read v. Robinson*, 6 Watts & S. 329; *Dargan v. Richardson*, 1 Cheves, L. 197; *Shubar v. Winding*, id. 218.

<sup>2</sup> *Crosby v. Hillyer*, 24 Wend. 280.

<sup>3</sup> *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Shepherd v. McEvers*, 4 Johns. 136; *Hulse v. Wright*, Wright, 61; *Pingree v. Comstock*, 18 Pick. 46; *Weir v. Tannehill*, 2 Yerg. 57; *Nicoll v. Mumford*, 4 Johns. Ch. 523; *Ward v. Lewis*, 4 Pick. 518; *New Eng. Bank v. Lewis*, 8 Pick. 113; *Robertson v. Sublett*, 6 Humph. 313; *Pearson v. Rockhill*, 4 Mon. 296; *Kelley v. Babcock*, 49 N. Y. 320.

<sup>4</sup> *Clark v. Wilson*, 77 Ind. 176.

<sup>5</sup> *First Nat'l Bank of Easton v. Smith*, 133 Mass. 26.

<sup>6</sup> *Atherton v. Worth*, 1 Dick. 375; *McDougald v. Dougherty*, 11 Ga. 570; *Wakeman v. Grover*, 4 Paige, 24; *Bryant v. Russell*, 23 Pick. 523;



But if the bill is to set aside the assignment for any reason, a single creditor may maintain it.<sup>1</sup> As a general rule, if the assignment is set aside and a receiver appointed, or the court orders the estate to be settled, claims will be paid *pari passu*; but some creditors may have obtained legal preferences at law, and in such case the court will order them to be paid according to their priority.<sup>2</sup>

§ 595. In a suit to enforce the trust under an assignment, the trustee must be brought before the court; and a proceeding without notice to him would be erroneous.<sup>3</sup> If the assignment is unconditional, the assignor, his heirs or representatives, need not be made parties;<sup>4</sup> but if there is an express stipulation that the surplus shall be paid to the assignor, he or his representatives must be parties.<sup>5</sup> So if the trust to pay debts is created under a will, the heir of the testator must be made a party to a suit.<sup>6</sup> A creditor may maintain a suit in behalf of such creditors as may join him against the assignees, for an administration of the trust; and, upon public notice being given for creditors to come in and

Edmeston *v.* Lyde, 1 Paige, 637; Hamilton *v.* Houghton, 2 Bligh, P. C. 169; Reynolds *v.* Bank of Va., 6 Grat. 174; Fisher *v.* Worth, 1 Busb. Eq. 63. But where one creditor filed a bill when no claim had been made for twenty years, and the trustee had stated that all the other creditors had been satisfied, he was allowed to maintain his bill. Mumford *v.* Murray, 6 Johns. Ch. 1.

<sup>1</sup> Russell *v.* Lasher, 4 Barb. 233; Wakeman *v.* Grover, 4 Paige, 24; Stout *v.* Higbee, 4 J. J. Marsh. 632. In Ohio, the creditor that procures the assignment to be set aside obtains a priority in the distribution of the assets. Atkinson *v.* Jordan, Wright, 247. The Rev. Statutes of N. Y. are to the same effect. Corning *v.* White, 2 Paige, 567; Burrall *v.* Leslie, 6 Paige, 445; Lucas *v.* Atwood, 2 Stew. 378.

<sup>2</sup> Gracey *v.* Davis, 3 Strob. Eq. 58; Austin *v.* Bell, 20 Johns. 442; McDermutt *v.* Strong, 4 Johns. Ch. 687; McMeekin *v.* Edmonds, 1 Hill, Eq. 293; Codwise *v.* Gelston, 10 Johns. 519; Le Prince *v.* Guillemont, 1 Rich. Eq. 220.

<sup>3</sup> Hamilton *v.* Houghton, 2 Bligh, 169; Routh *v.* Kinder, 3 Swanst. 144, n.

<sup>4</sup> Hobart *v.* Andrews, 21 Pick. 532.

<sup>5</sup> Houghton *v.* Davis, 23 Maine, 28.

<sup>6</sup> Harris *v.* Ingledew, 3 P. Wms. 93.

prove their claims, all creditors will be barred, although they may have had no actual notice.<sup>1</sup> But a single creditor cannot sue a trustee for neglect or default, the remedy is by bill in equity on behalf of all the creditors; nor can an individual creditor sue at law to recover any larger part of his debt than is ascertained or admitted to be due from the trustee.<sup>2</sup>

§ 596. As a matter of course, mortgagees, judgment creditors, and all others having a lien upon the trust property prior to the assignment, are not affected by it. Their rights remain as before the assignment; and an attachment or any lien that is fastened upon the property after the assignment is made, but before it is accepted by the trustee, takes preference of the assignment.<sup>3</sup> A creditor as one of the *cestuis que trust* may be a trustee;<sup>4</sup> in such case he has no power to prefer his own claim, but must take equally with the others, unless by the terms of the deed a preference is given him.<sup>5</sup> By accepting the trust according to its terms, a creditor trustee waives all claims and liens upon the property inconsistent with the deed.<sup>6</sup> But it is said, that the rule which prohibits a trustee from acquiring an interest adverse to his *cestui que trust* does not apply to a *bona fide* creditor who has become trustee; and that such trustee may purchase a judgment against his *cestui que trust*.<sup>7</sup> But the fact that the trustee is a *bona fide* creditor, ignorant of any fraud, will

<sup>1</sup> Kerr v. Blodgett, 48 N. Y. 62.

<sup>2</sup> Bouvé v. Cottle, 143 Mass. 313.

<sup>3</sup> Crosby v. Hillyer, 24 Wend. 280; Codwise v. Gelston, 10 Johns. 517; Hayes v. Heidelberg, 9 Penn. St. 203; Hogan v. Strayhorn, 65 N. C. 279; Bloomer v. Waldron, 3 Hill, 367.

<sup>4</sup> Balfour v. Welland, 16 Ves. 151; Boazman v. Johnston, 3 Sim. 377; Acton v. Woodgate, 2 Myl. & K. 49; Siggers v. Evans, 32 Eng. L. & Eq. 139; Hobson v. Thelluson, L. R. 2 Q. B. 642.

<sup>5</sup> Boazman v. Johnston, 3 Sim. 382; Anon. 2 Ch. Cas. 54; Child v. Stephens, 1 Eq. Cas. Ab. 141; 1 Vern. 102; Garrard v. Lauderdale, 3 Sim. 1; Miles v. Bacon, 4 J. J. Marsh. 468; Harrison v. Mock, 10 Ala. 185.

<sup>6</sup> Harrison v. Mock, 10 Ala. 185.

<sup>7</sup> Prevost v. Gratz, Peters, C. C. 373.

not prevent the assignment from being declared void, if it is fraudulent upon any legal grounds.<sup>1</sup> So creditors who accept the benefits conferred under such deed, and receive dividends or other advantages thereby, cannot set up rights inconsistent with the deed; nor can they, after receiving such advantages, impeach it, and procure it to be set aside, but they must comply with its provisions.<sup>2</sup> The assignee of an insolvent affirms a fraudulent sale made by his assignor by suing the fraudulent purchaser for the price.<sup>3</sup> A creditor, before he can commence process to set aside a fraudulent assignment or conveyance, must first obtain judgment on his claim.<sup>4</sup> If the debtor B. is unwilling to give a mortgage directly to one of his creditors A., but executes one to another creditor C., to secure C. in regard to what is owing to C. directly, and in respect to any liabilities incurred by C. on B.'s account, and C. guarantees to A. the payment of B.'s debt to him, A. can enforce the trust thus created against C. to the full extent of the mortgage, if necessary in order to pay debts to A. not otherwise secured.<sup>5</sup>

§ 597. When an assignment is made and executed, and all parties assent that the estate shall be managed and settled by trustees, the deed that vests the estate in the trustees for the payment of the debts, may prescribe the manner of carrying the trust into execution, and paying the debts.<sup>6</sup> These directions may be contrary to law, and may be set aside on proceedings had for that purpose, yet if all parties proceed under the deed, the trustees must find their power in the deed of assignment or settlement, and they must proceed in accordance with it in selling the property and in paying the

<sup>1</sup> *Rathburn v. Platner*, 18 Barb. 272.

<sup>2</sup> *Adlum v. Yard*, 1 Rawle, 163; *Gutzwiller v. Lackman*, 23 Miss. 168; *Pratt v. Adams*, 7 Paige, 615; *Burrows v. Alter*, 7 Miss. 424; *Jewett v. Woodward*, 1 Edw. Ch. 195; *Lanahan v. Latrobe*, 7 Md. 268.

<sup>3</sup> *Butler v. Hildreth*, 5 Met. 49.

<sup>4</sup> *Neustadt v. Joel*, 2 Duer, 532.

<sup>5</sup> *Parsons v. Clark*, 132 Mass. 569.

<sup>6</sup> *Boazman v. Johnston*, 3 Sim. 381; *Carr v. Burlington*, 1 P. Wms. 229.

debts; if preferences are made, the trustees must pay them;<sup>1</sup> if all are to be paid equally, the trustees must pay in that manner.<sup>2</sup> If the trust is to pay only a certain class of debts, or a certain number of debts named, the trustees must confine themselves to their power.<sup>3</sup> The principle on which this rests is, that the assignor was the owner of the property, and he could give such directions as to the disposal of it as he pleased; and, so long as the law does not interfere to set aside the assignment, the assignee must follow the only power given to him, to wit, the deed of assignment. In England, the deed generally specifies the mode of raising the money for the purpose of the trust, by directing a sale or mortgage. In the absence of such direction, the intention is to be gathered from the scope of the whole deed, whether a sale or mortgage was intended; for the intention is to govern.<sup>4</sup> If the property is conveyed in trust to pay debts generally, the trustees can make a good title to the purchaser, either in fee or in mortgage, and the purchaser is not bound to see whether there are debts, or whether a sale is necessary, or to see to the application of the purchase-money: the creditors must look to the trustees.<sup>5</sup> But if the

<sup>1</sup> *Garrard v. Lauderdale*, 3 Sim. 1; *Douglass v. Allen*, 2 Dr. & War. 213; *Pearce v. Slocombe*, 3 Y. & Col. 84.

<sup>2</sup> *Ibid.*; *Anon.* 3 Ch. Cas. 54; *Wolestoncroft v. Long*, 1 id. 32; *Child v. Stevens*, 1 Vern. 102; *Hamilton v. Houghton*, 2 Bligh, 169.

<sup>3</sup> *Purefoy v. Purefoy*, 1 Vern. 28; *Loddington v. Kime*, 3 Lew. 433; *Pratt v. Adams*, 7 Paige, 615; *Stoddart v. Allen*, 1 Rawle, 258; *Brainard v. Dunning*, 30 N. Y. 211.

<sup>4</sup> *Spalding v. Shalmer*, 1 Vern. 301; *Ball v. Harris*, 8 Sim. 485; *Sheldon v. Dormer*, 2 Vern. 310; *Shrewsbury v. Shrewsbury*, 1 Ves. Jr. 234; *Ivy v. Gilbert*, 2 P. Wms. 13; *Mills v. Banks*, 3 id. 1; *Allen v. Backhouse*, 2 V. & B. 65; *Wilson v. Halliley*, 1 R. & M. 590; 1 Sugd. Pow. 116; *Stroughill v. Anstey*, 1 De G., M. & G. 635.

<sup>5</sup> *Johnson v. Kennett*, 3 Myl. & K. 631; *Shaw v. Borrer*, 1 Keen, 559; *Eland v. Eland*, 4 Myl. & Cr. 428; *Forbes v. Peacock*, 11 Sim. 152; *Page v. Adam*, 4 Beav. 269; *Culpepper v. Aston*, 2 Ch. Cas. 115; *Anon.* Salk. 153; *Dunch v. Kent*, 1 Vern. 260; *Jenkins v. Hiles*, 6 Ves. 654, n.; *Williamson v. Curtis*, 3 Bro. Ch. 96; *Doran v. Wiltshire*, 3 Swanst. 699; *Jones v. Price*, 11 Sim. 558; *Glyn v. Locke*, 3 Dr. & War. 11; 2 Sugd. V. & P. 32; *Doe v. Hughes*, 6 Exch. 223; *Lock v. Lomas*, 21 L. J. Ch. 503; *Robinson v. Lowater*, 17 Beav. 601; 5 De G., M. & G. 277.

trust is to pay one particular debt, or debts named in a schedule, the purchaser must see to the necessity of the sale, and to the application of the purchase-money,<sup>1</sup> unless the trustees are authorized to give receipts, or there is a clause in the trust-deed discharging the purchaser from such obligations.<sup>2</sup>

§ 598. In the United States, a deed of assignment to pay debts necessarily implies a power to sell; and if it is an insolvent estate, a power to mortgage contained in the deed would render it fraudulent and void;<sup>3</sup> therefore all deeds of assignment for the payment of debts generally, without any limitations or directions, confer upon the trustees a right to sell.<sup>4</sup> But if there are special directions given as to the time, manner, and conditions of sale, they must be followed as given.<sup>5</sup> Thus a conveyance of land in trust to pay out of the rents and profits the grantor's debts, and to support the grantor, his wife, and children, and at his death to divide it among his children, gave no right to sell for payment of debts, or for any purpose.<sup>6</sup> An unsealed writing purporting to convey land in trust to pay one debt, does not confer a power of sale, but creates a simple lien to be enforced in equity.<sup>7</sup> If a trustee sells, however, without power, and all parties are present, acquiescing in the sale, they are estopped in equity to deny the title of the purchaser.<sup>8</sup> An assignment that does not purport to convey land in trust will not give

<sup>1</sup> *Doran v. Wiltshire*, 3 Swanst. 701; *Elliott v. Merryman*, Barn. 78; 1 Keen, 573; 2 Atk. 41; *Spalding v. Shalmer*, 1 Vern. 301; *Lloyd v. Baldwin*, 1 Ves. 73; *Balfour v. Welland*, 16 Ves. 151.

<sup>2</sup> *Binks v. Rokeby*, 2 Madd. 227; *Roper v. Hallifax*, 2 Sugd. Pow. 501, App. 3; *Jones v. Price*, 11 Sim. 557; *Culpepper v. Aston*, 2 Ch. Cas. 115; *Spalding v. Shalmer*, 1 Vern. 301; *Braybroke v. Inskip*, 8 Ves. 417.

<sup>3</sup> *Planck v. Schermerhorn*, 3 Barb. Ch. 644.

<sup>4</sup> *Goodrich v. Proctor*, 1 Gray, 567; *Purdie v. Whitney*, 20 Pick. 25; *Gould v. Lamb*, 11 Met. 84; *Williams v. Otey*, 8 Humph. 563.

<sup>5</sup> *Walker v. Brungard*, 13 Sm. & M. 723.

<sup>6</sup> *Mundy v. Vawter*, 3 Grat. 518.

<sup>7</sup> *Linton v. Boly*, 12 Mo. 567.

<sup>8</sup> *Spencer v. Hawkins*, 4 Ired. Eq. 288.

the trustees power to sell.<sup>1</sup> If the trustee has power to sell land to pay debts generally, it is impossible for the purchaser to know what the debts are, or whether there is a necessity for the sale. This is a part of the trust and duty confided in the trustee, and a purchaser is not obliged to look to the application of the purchase-money.<sup>2</sup> The English rules upon this subject are not favored in this country, and they will not be applied if any circumstance can be found to take the case out of their operation. But if the trust is to pay a particular debt, or certain debts named in a schedule, the purchaser must see to the necessity of the sale, and to the application of the purchase-money, unless there is some circumstance or power to take the case out of the rule.<sup>3</sup> If there is collusion or fraud between the trustee and purchaser, or knowledge in the purchaser that there are no debts, or that the sale is unnecessary or not authorized, it is all void as fraudulent.<sup>4</sup> Although there is fraud, or a misapplication of the purchase-money with the knowledge of the purchaser, he will take a good *title at law*; but equity will convert him into a trustee, and make him accountable to the creditors or *cestuis que trust*.<sup>5</sup>

<sup>1</sup> Baker v. Crookshank, 1 Whart. Dig. (6th ed.) Debt. & Cred. pl. 370.

<sup>2</sup> Goodrich v. Proctor, 1 Gray, 670; Andrews v. Sparhawk, 13 Pick. 393; Gardner v. Gardner, 3 Mason, 178; Williams v. Otey, 8 Humph. 568; Garnett v. Macon, 2 Brock. 185; 6 Call, 308; Grant v. Hook, 13 Serg. & R. 259; Bruch v. Lantz, 2 Rawle, 392; Coombs v. Jordan, 3 Bland, 284; Redheimer v. Pyron, Spears, Eq. 134; Cadbury v. Duval, 10 Penn. St. 267; Dalzell v. Crawford, 1 Pars. Eq. 57; Hannum v. Spear, 1 Yeates, 553; 2 Dall. 291; Hauser v. Shore, 5 Ired. Eq. 357; Sims v. Lively, 14 B. Mon. 433; Lining v. Peyton, 2 Des. 378; Wilson v. Davisson, 2 Rob. (Va.) 385; Nicholls v. Peak, 12 N. J. Eq. 69; Rutledge v. Smith, 1 Bush. Eq. 283.

<sup>3</sup> Gardner v. Gardner, 3 Mason, 178; Duffy v. Calvert, 6 Gill, 487; Wormley v. Wormley, 8 Wheat. 422; Cadbury v. Duval, 10 Penn. St. 267; Dalzell v. Crawford, 1 Pars. Eq. 57; Elliott v. Merryman, 1 Lead. Cas. Eq. 45, n.

<sup>4</sup> Potter v. Gardner, 12 Wheat. 498; Garnett v. Macon, 2 Brock. 185; Redheimer v. Pyron, Spears, Eq. 134.

<sup>5</sup> D'Oyley v. Loveland, 1 Strob. L. 46. A sale by a trustee holding the legal title, though unauthorized or collusive, will generally pass the

§ 599. As a general rule, the assets of a partnership are holden to pay partnership debts, and the separate property of each individual partner is holden, first, to pay his private debts; so, if an insolvent partnership make an assignment, the trustee must apply the joint property to the joint debts, and the separate property to private debts.<sup>1</sup> So a partnership assignment that prefers private debts is void; and a general assignment by an individual partner that preferred partnership debts, would be void.<sup>2</sup> But where it is legal to make preferences, an assignment may probably prefer either class.<sup>3</sup> So it is said that provisions in a partnership assignment that do not go beyond the provisions of the law will not avoid it, though releases are stipulated for.<sup>4</sup> But a partnership assignment that provides for a release, must convey all the property, joint and separate, held by the firm;<sup>5</sup> and the deed must be signed and sealed by all the members of the firm; for a general assignment by one partner will not pass the partnership assets;<sup>6</sup> nor will a general assignment by a single member of a limited partnership pass the property of the firm.<sup>7</sup> By statutes in nearly all the States, all preferences by limited partnerships are forbidden.<sup>8</sup>

§ 600. If by the terms of an assignment no debts are to be paid until they have been examined by the trustees, a creditor can claim no benefit under the deed, until he has submitted his claim to the trustees.<sup>9</sup> If the trustees are clothed with absolute power to allow or reject all claims, the court cannot

legal title; but the grantee will take the estate charged with the same trusts that the original trustee was charged with.

<sup>1</sup> *Pearce v. Slocombe*, 3 Y. & Col. 84; *Merrill v. Neill*, 8 How. 414.

<sup>2</sup> *Jackson v. Cornell*, 1 Sandf. Ch. 348.

<sup>3</sup> *Kirby v. Schoonmaker*, 3 Barb. Ch. 46.

<sup>4</sup> *Andress v. Miller*, 15 Penn. St. 318.

<sup>5</sup> *Hennessey v. Western Bank*, 6 Watts & S. 300.

<sup>6</sup> *Ibid.*; *Moddewell v. Keever*, 8 Watts & S. 63.

<sup>7</sup> *Merritt v. Wilson*, 29 Maine, 58.

<sup>8</sup> *Mills v. Argall*, 6 Paige, 577.

<sup>9</sup> *Wain v. Egmont*, 3 Myl. & K. 445; *Drever v. Mawdesley*, 16 Sim. 511; *Nunn v. Wilsmore*, 8 T. R. 521; *Cosser v. Radford*, 1 De G., J. & Sm. 585.

interfere with their discretion;<sup>1</sup> but such a power in a general assignment by an insolvent debtor would render the assignment void. So a power given to the trustees to prefer such debts as they please would render the assignment void.<sup>2</sup> A general power to pay debts will not justify the trustees in paying fictitious debts;<sup>3</sup> nor will it include debts founded upon a usurious consideration:<sup>4</sup> but, where such debts are specially named and directed to be paid, the trustee cannot refuse to pay them, deducting the usurious excess.<sup>5</sup> If a debt is specially directed to be paid, and afterwards a bill is sustained to set aside such debt as illegal or fraudulent, the trustees cannot pay it.<sup>6</sup> So a general direction in a will to pay debts applies only to legal debts, due upon good consideration, and enforceable against the testator's estate.<sup>7</sup> A trust to pay debts named in the schedule does not convert such debts into interest-bearing debts if they did not bear interest before. Even if the direction is to pay certain debts with interest, debts that do not bear interest will not be thus converted into interest-bearing debts.<sup>8</sup> But debts that bear interest, by the contract proving them, must be paid with

<sup>1</sup> Ibid.

<sup>2</sup> *Wakeman v. Grover*, 4 Paige, 24; 11 Wend. 187; *Hudson v. Maze*, 3 Scam. 579. But a power given to the trustees to compromise claims due to the estate does not avoid it. *Bellows v. Partridge*, 19 Barb. 178.

<sup>3</sup> *Irwin v. Keen*, 3 Whart. 347; *Webb v. Daggett*, 2 Barb. 10; *Hardcastle v. Fisher*, 24 Mo. 70.

<sup>4</sup> *Pratt v. Adams*, 7 Paige, 617; *Beach v. Fulton Bank*, 3 Wend. 584.

<sup>5</sup> *Green v. Morse*, 4 Barb. 332; *Pratt v. Adams*, 7 Paige, 641.

<sup>6</sup> *Morse v. Crofoot*, 4 Comst. 114.

<sup>7</sup> *Rogers v. Rogers*, 3 Wend. 503; *Chandler v. Hill*, 2 Hen. & M. 124. Chancellor Kent, in an opinion, printed 6 Humph. 532, advised that a preference given by a bank to pay notes illegally issued for borrowed money was valid, and that the trustees should pay them. The bank should be liable for money had and received, though the issuing of its bills was illegal. It had had the consideration and ought to pay, though it had done such acts as to forfeit its charter.

<sup>8</sup> *Carr v. Burlington*, 1 P. Wms. 229; *Bothomly v. Fairfax*, id. 334; *Maxwell v. Wottenhall*, 2 id. 27; *Lloyd v. Williams*, 2 Atk. 111; *Barwell v. Parker*, 2 Ves. 361; *Creuze v. Hunter*, 2 Ves. Jr. 157; 4 Bro. Ch. 316; *Tait v. Northwick*, 4 Ves. 816; *Shirley v. Ferrers*, 1 Bro. Ch. 41; *Hamilton v. Houghton*, 2 Bligh, 169.



interest.<sup>1</sup> If interest is realized by trustees upon funds in their hands, interest must be paid.<sup>2</sup> If the trustees permit a creditor to sign the deed for a specified sum, they cannot afterwards contest the debt.<sup>3</sup> But if there is gross fraud, they can apply to the court to set it aside.<sup>4</sup> If a creditor repudiates the deed and sues the debtor, the trustee cannot allow him to retrace his steps and sign the deed; and if he should allow it to be done, the other creditors may procure it to be set aside.<sup>5</sup>

§ 601. It has been held in some cases that a devise for the payment of debts will prevent the statute of limitations from running against such debts as are not barred at the time of the testator's death; but it will not revive a debt already barred,<sup>6</sup> upon the principle that, as soon as a trust is created for the payment of a debt, the statute of limitations ceases to apply, as it does not run against trusts generally. Mr. Hill inclines to the opinion, that the same principle would apply to trusts under deeds for the payment of debts;<sup>7</sup> but it is held in the United States, that an assignment by deed for the benefit of creditors, or an assignment in insolvency, does

<sup>1</sup> *Hamilton v. Houghton*, 2 Bligh, 187; *Tait v. Northwick*, 4 Ves. 816; *Bath v. Bradford*, 2 Ves. 588; *Stewart v. Noble*, Vern. & Scriv. 528, 536; *Anon.* 1 Salk. 154; *Burke v. Jones*, 2 V. & B. 284; *Hughes v. Wynne*, 1 Myl. & K. 20; *Pearce v. Slocombe*, 3 Y. & Col. 84; *Bryant v. Russell*, 23 Pick. 508; *Winslow v. Ancrum*, 1 McCord, Ch. 100. But it has been held, that, in cases of preferred debts, the preference applied only to the principal debt, and that the interest was to be paid *pro rata* with the unpreferred debts. *Morris's App.*, 1 Am. Law Reg. 631.

<sup>2</sup> *Pearce v. Slocombe*, 3 Y. & Coll. 84.

<sup>3</sup> *Lancaster v. Elce*, 31 Beav. 335.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Field v. Donoughmore*, 1 Dr. & War. 227, reversing 2 Dru. & Walsh, 630.

<sup>6</sup> *Fergus v. Gore*, 1 Sch. & Lef. 107; *Hughes v. Wynne*, T. & R. 307; *Culton v. Oughton*, 3 Beav. 1; *Burke v. Jones*, 2 V. & B. 275; *Hargreaves v. Mitchell*, 6 Madd. 326; *Harcourt v. White*, 28 Beav. 303; *Jones v. Scott*, 1 R. & M. 225; 4 Cl. & Fin. 382; *O'Connor v. Haslam*, 5 H. L. Cas. 177.

<sup>7</sup> *Hill on Trustees*, 341.

not prevent the statute from running, and it would be a good plea in bar at law, although the debts were specially named in the deeds or schedules.<sup>1</sup> But the creditors may enforce their claims in equity against the assets in the hands of the trustees.<sup>2</sup>

§ 602. In settling an estate under an assignment, the preferred debts will first be paid. The remainder is then distributed to the unpreferred debts due at the date of the assignment, *pro rata*, if there is a deficiency of assets.<sup>3</sup> If there is a residue, after paying all the creditors who come in under the deed, it results to the assignor.<sup>4</sup> If there are non-assenting creditors who have no rights under the deed, they can reach the surplus in the hands of the trustee, by the process of foreign attachment, garnishment, or trustee process.<sup>5</sup>

§ 602 a. Intimately connected with general assignments in trust for creditors, thus far treated of in this chapter, are trusts created by deeds to secure the payment of particular debts, — deeds which give the grantee certain powers over the estate, but do not exhaust the entire interest of the grantor in it. Such a trust was the subject of discussion in a recent case, in which the will of the trustee discharged the land from

<sup>1</sup> Reed v. Johnson, 1 R. I. 81; Christy v. Flemington, 10 Penn. St. 129.

<sup>2</sup> Gary v. May, 16 Ohio, 66. And this must be upon the principle of Mr. Hill's opinion above cited. As soon as a trust is created for the payment of a debt, and the relation of trustee and *cestui que trust* is established, the statute of limitations does not run so long as the relation exists, but that does not prevent the statute from running at law against the original debtor; though how far the execution of the deeds or schedules naming a debt would be a memorandum in writing acknowledging the debt, and thus taking it out of the statute, is not very well settled.

<sup>3</sup> Purefoy v. Purefoy, 1 Vern. 28.

<sup>4</sup> 3 P. Wms. 251, n.; Poole v. Pass, 1 Beav. 600; Dubose v. Dubose, 7 Ala. 235; Hall v. Denison, 17 Vt. 311; Rahn v. McElrath, 6 Watts, 151; Stevens v. Earles, 25 Mich. 41. So if there is a residue in the hands of an assignee in bankruptcy.

<sup>5</sup> Hastings v. Baldwin, 17 Mass. 558; Hearn v. Crutcher, 4 Yerg. 461; Wright v. Henderson, 7 How. (Miss.) 539; Todd v. Bucknam, 2 Fairf. 41; Dubose v. Dubose, 7 Ala. 235; Vernon v. Morton, 8 Dana, 247.

liability for the debts to cover which the trust had been created.<sup>1</sup> In an Illinois case A. took title to certain land to secure a debt due him, and to pay any surplus to B. and equity enforced the trust.<sup>2</sup> These deeds of trust and mortgage-deeds containing powers of sale create a peculiar kind of trust, which it is proper to discuss in this connection.

§ 602 b. There are several forms of mortgages: (1) A mortgage in the common form of a conveyance of the estate, with a defeasance inserted which provides, that if a certain sum of money shall be paid within a certain time the deed shall be void. (2) A mortgage in the form of a deed absolute on its face, but which was made to pay or secure a debt, and the grantor takes back from the grantee an agreement that when the debt is paid, or when a certain sum of money is paid to the grantee, he will sell and convey the premises to the grantor. The parties sometimes resort to ingenious devices to disguise the transaction; but if the substance of the transaction is the security of an antecedent debt, it will be decreed to be a mortgage, whatever may be the form of the writings, or whatever may be their recitals; and even parol evidence is admissible in some States under some circumstances to prove that a deed absolute on its face is in fact a mere security for a debt or a mortgage.<sup>3</sup> Both these forms of mortgage can be foreclosed only by proceedings in equity for a foreclosure, or by an entry and taking possession according to the law or the statutes in force where the land is situated, and by the expiration of three years or other limit of time fixed to bar the mortgagor's equity of redemption. (3) A mortgage may be in the form of a deed of trust from the grantor to the grantee, providing that if the grantor shall not pay a certain sum of money at a certain time, the grantee may sell the estate in a certain manner, or do whatever other thing the deed of trust points out to be done. (4) A

<sup>1</sup> *Damon v. Bibber*, 135 Mass. 458.

<sup>2</sup> *Gillett v. Hickling*, 16 Brad. (Ill.) 392.

<sup>3</sup> *Ante*, § 226 ; *Campbell v. Dearborn*, 109 Mass. 130, where the cases are reviewed.

fourth form of mortgage is a deed of conveyance with a defeasance inserted as in ordinary mortgages, and with a power of sale superadded to enable the grantee or mortgagee to sell the property at any time after default of payment, according to the terms of the power contained in the mortgage. It is quite apparent that many questions peculiar to the law of trusts must arise under deeds and mortgages which contain such powers and provisions.

§ 602 c. In the civil law a power of sale was implied in every mortgage upon default of payment according to the terms of the pledge, and an express agreement did not deprive the mortgagee of this right.<sup>1</sup> By the common law, at first, mortgages became absolute deeds, if the terms of the defeasance were not strictly performed at the day; but courts of equity succeeded in establishing an equity of redemption in the mortgagor in the land, which remained an equity in him until the mortgage was duly foreclosed by process of law. Courts were astute in protecting this equity of redemption, and leaned strongly against all agreements between the mortgagor and mortgagee which abridged it. "Once a mortgage always a mortgage" became a maxim. Therefore, when provisions began to be inserted in deeds which enabled the mortgagee to destroy at once this equity of redemption, courts looked upon them with suspicion, if not with aversion, as devices intended to oppress and injure mortgagors, who are, from the nature of the case, more or less in the power of mortgagees. Perhaps, where the rights of the mortgagor were not properly guarded, the fears of Lord Eldon and others, who opposed the introduction of these forms and trusts, were not unreasonable or groundless. But, notwithstanding all opposition, the use of them has steadily increased, until they are common in England and in nearly all the States. They are regulated by statutes, and are under the jurisdiction of courts of equity, which can interfere, by injunctions, prohibitions, orders, and decrees, to prevent oppression and remedy abuses. A large proportion of the

<sup>1</sup> 1 Domat, 360.

mortgage-deeds of real estate now contain powers of sale in case of default, and the laws regulate and protect them.<sup>1</sup>

§ 602 *d.* Mortgages containing powers of sale and deeds of trust to secure a debt due to a creditor are as a rule substantially the same thing in law and equity; but a deed of trust may be made so as to contain no forfeiture (no limit to the right to redeem so long as the land remains in the hands of the trustee), but merely a power in the trustees to enter on default and manage, sell, etc., as agents of the grantor for the purpose of paying his debts and handing over any surplus to the grantor, and in such case it is very different from a mortgage. No foreclosure by entry and lapse of time is possible under such a deed, for foreclosure can exist only where there is an equity of redemption to foreclose, and there can be no equity of redemption where there is no forfeiture agreed upon, for equities of redemption came into existence and live in the law only to relieve against forfeitures.<sup>2</sup> At law, both kinds of deeds purport to convey the legal title to the grantee, or creditor, or trustee; but in equity the land, the title, and the deeds stand for security of the debt. The debt is the principal thing, and the conveyance of the land is collateral to the debt. The mortgagor in both cases has an estate in the land called an equity of redemption; if he fails to pay the debt, his equity of redemption is barred upon due proceedings had; but if the debt is paid at any time before his equity is defeated by the steps appointed to be taken, it becomes absolute, and he is entitled to a reconveyance or a discharge of the mortgage, as the case may be. In some circumstances a discharge of the mortgage

<sup>1</sup> *Croft v. Powell*, 1 Comyn, 603 (1729); 2 Cruise, Dig. 90; *Clay v. Sharpe*, Sugd. V. & P. App. 21; *Corder v. Morgan*, 18 Ves. 344; 2 Call, 465, 568; *Curling v. Shuttleworth*, 6 Bing. 121; *Forster v. Hoggart*, 15 Q. B. 155; *Clay v. Willis*, 1 B. & C. 364; 4 Kent's Com. 146; 2 Story, Eq. Jur. § 1027; *Longwith v. Butler*, 3 Gilm. 32; *Slee v. Manhattan Co.*, 1 Paige, 57; *Lawrence v. Farmer's Loan & Trust Co.*, 3 Kern. 200; *Bronson v. Kinsie*, 1 How. 321; *Fogarty v. Sawyer*, 17 Cal. 589; *Bradley v. Phil. R. R. Co.*, 36 Penn. St. 141; *Hyde v. Warren*, 46 Miss. 13.

<sup>2</sup> *Shepard v. Richardson*, 145 Mass. 32, 36.

upon payment or a reconveyance is not material, as by the terms of the mortgage and by the law it becomes null and void. A mortgage is a pledge or security for a debt, whatever may be the form which the transaction takes, whether a simple mortgage-deed in form, or a mortgage with a power of sale, or a deed in trust, or a deed absolute on its face, accompanied by an agreement in writing to reconvey, or to sell, or to do any other thing upon the payment of a certain sum of money; courts of equity look upon it as a mortgage, and deal with it as such. The test in all these forms is this, Does the transaction resolve itself into a security for the payment of a sum of money or a debt; and until a default in the payment of a sum of money or a debt, has the grantor any right to pay the money and keep or receive back the title to his property?<sup>1</sup> And it is immaterial that the conveyance is made to a third person, and not to the creditor himself. In such case the grantee is a trustee by an express or a resulting trust, as the case may be, to the amount of the debt, and the grantor has an equity in all beyond, or if the deed is absolute on its face, or a deed of trust, the grantee is a trustee for the grantor for what remains over and above the debt.<sup>2</sup> Thus a bank authorized to hold lands mortgaged for security may take deeds of trust to themselves or to trustees for their use;<sup>3</sup> and a railroad company authorized to mortgage its property was held to have authority to make a deed of trust;<sup>4</sup> and where there are special statutes in relation to the recording of mortgages, it has been held that these statutes embrace

<sup>1</sup> 4 Kent's Com. 136, 146; 2 Story, Eq. Jur. § 1018; *Cotterell v. Long*, 20 Ohio, 464, 472; *Wilcox v. Morris*, 1 Murph. (N. C.) 116; *Eaton v. Whiting*, 3 Pick. 484; *Bloom v. Rensselaer*, 15 Ill. 505; *Woodruff v. Robb*, 19 Ohio, 217; *Sargent v. Howe*, 21 Ill. 149; *Fanning v. Kerr*, 7 Iowa, 450; *Crocker v. Robertson*, 8 Iowa, 404; *Flagg v. Mann*, 2 Sumn. 533; *Jackson v. Blount*, 2 Dev. Eq. 555; *Rogan v. Walker*, 1 Wis. 527; *Johnson v. Clark*, 5 Ark. 321. A judgment against the grantor who remains in possession after default with the acquiescence of the mortgagee, is a lien on the premises subject to the mortgage, or trust-deed in the nature of a mortgage. *Martin v. Aliter*, 42 Ohio St. 94.

<sup>2</sup> *Woodruff v. Robb*, 19 Ohio, 217; *Sargent v. Howe*, 21 Ill. 450.

<sup>3</sup> *Bennett v. Union Bank*, 5 Humph. 612.

<sup>4</sup> *Wright v. Bundy*, 11 Met. 398, 404.

deeds of trust made as security for debts;<sup>1</sup> and so the statutes relating to the satisfaction and discharge of mortgages embrace deeds of trust,<sup>2</sup> and it has been held that an agent, having a general power to execute a mortgage in the name of his principal, may execute a mortgage containing a power of sale.<sup>3</sup> There are incidental differences between mortgages with or without powers of sale and deeds of trust, as there are differences in mortgage-deeds themselves in the special stipulations that may be inserted. Parties can make their own contracts; and the contracts must be performed according to the special stipulations;<sup>4</sup> but both mortgages and deeds of trust are alike in their great characteristics. They both stand as security for the payment of money or the performance of some other obligation; under both the grantor has an equitable right of redemption, or to have the property again upon the performance of his obligation, and this equity of redemption can only be barred by regular proceedings according to the law, or according to the provisions and conditions contained in the respective deeds.

§ 602 *e*. Mortgages with power of sale and deeds of trust are executed like all other instruments of trust. They need not be signed by the grantee, trustee, or *cestuis que trust*. Acceptance of the trusts created under them may be proved by parol, whether such acceptance was manifested by words or acts.<sup>5</sup> The assent of the creditors to be secured by such

<sup>1</sup> Magee *v.* Carpenter, 4 Ala. 469; Fogarty *v.* Sawyer, 23 Cal. 570.

<sup>2</sup> McGregor *v.* Hall, 3 Stew. & Por. 397; Woodruff *v.* Robb, 19 Ohio, 212; Wolfe *v.* McDowell, 13 Sm. & M. 103; Smith *v.* Doe, 26 Miss. 291; Crosby *v.* Huston, 1 Tex. 239.

<sup>3</sup> Wilson *v.* Troup, 7 Johns. Ch. 25; 2 Cowen, 195; 4 Kent, Com. 147.

<sup>4</sup> Elliott *v.* Wood, 45 N. Y. 71.

<sup>5</sup> *Ante*, §§ 589, 593, 594; Scull *v.* Reeves, 2 Green, Ch. 84; Flint *v.* Clinton Co., 12 N. H. 432; Spencer *v.* Ford, 1 Rob. (Va.) 648; Liffler *v.* Armstrong, 4 Iowa, 482; Pope *v.* Brandon, 2 Stew. (Ala.) 401; Skipwith *v.* Cunningham, 8 Leigh, 271; Hipp *v.* Hutchell, 4 Tex. 20; Field *v.* Arrowsmith, 3 Humph. 442; Robertson *v.* Sublett, 6 id. 313; Brevard *v.* Neely, 2 Sneed, 164; Mayer *v.* Pullam, 2 Head, 347.

deeds will be presumed, if they are beneficial to them; but if the effect of the deeds is to hinder and delay the creditors, their assent must be shown,<sup>1</sup> and such deeds cannot be revoked after the assent of the parties to be benefited.<sup>2</sup>

§ 602 f. Such deeds may be executed for the payment of debts, or for the performance of any kind of a legal obligation, whether of the grantor or of a third person. So they may be given to indemnify one against contingent obligations. Thus a trust-deed to indemnify sureties upon a bond or note or endorser of notes will be upheld;<sup>3</sup> and so mortgages with power of sale, made by a married woman to pay the debt or note of her husband, have been upheld in law and equity.<sup>4</sup>

§ 602 g. The powers of trustees under deeds of trust, and of mortgagees under mortgages with power of sale, depend entirely upon the terms of the deeds. Such powers are created by, and exist in the deeds, and of course they exist in the terms in which they are created, and in no others. They are to be exercised by the trustees *in pais*. They are wholly matters of convention and contract between the parties, and not of law or jurisdiction. They can be exercised because they are conferred by one party upon another, and not because the law or the courts have conferred or authorized them. Statutes in some of the States have regulated their execution, but such statutes do not create the powers themselves.<sup>5</sup> (a) Therefore it is that purchasers of land under

<sup>1</sup> *Ante*, § 593; *Shearer v. Lofton*, 26 Ala. 703; *Wiswall v. Ross*, 4 Porter (Ala.), 328; *Mauldin v. Armstead*, 14 Ala. 702.

<sup>2</sup> *Ante*, §§ 593, 594; *Gate v. Debrett*, 10 Yerg. 146.

<sup>3</sup> *Griffin v. Doe*, 12 Ala. 783; *Hawkins v. May*, *id.* 673; *Thurston v. Prentiss*, 1 Mich. 194, Walk. Ch. 529; *Graham v. King*, 15 Ala. 563, 5 Port. 191; *Boden v. Jaco*, 17 Ala. 341. But see *Jackson v. Hampton*, 8 Ind. 457.

<sup>4</sup> *Young v. Graff*, 28 Ill. 20; *Bartlett v. Bartlett*, 4 Allen, 440.

<sup>5</sup> *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Beattie v. Butler*, 21 Mo. 313;

(a) See *Jones on Mortgages, passim; supra*, § 199, n.



powers take under the deed in which the powers are created; it is as if the purchaser's name was inserted in that deed. It follows that the purchaser must look carefully to the intention and purpose of the power as well as to its extent, for if it is executed contrary to its intent or purpose, or outside of its true scope, or not in the manner in which it is provided that it should be executed, the purchaser will take no title. The purchaser is bound to know the full particulars and purpose of the power under which he purchases; and if he makes any mistake in the construction of the power, or if he does not fully inform himself and acts in ignorance, he will take no title if the power is not properly executed.<sup>1</sup> The power to sell need not be contained in the same instrument with the conveyance of the title. Thus a simple mortgage may be made without a power of sale to secure a debt, and at the same time the mortgagor may give a power to the mortgagee or to a third person to sell the land upon default of payment, and to pay the debt from the proceeds, and to account for the balance, if any; and such power will be valid, and the execution of it will bar the equity of redemption of the mortgagor;<sup>2</sup> and so the power may be changed by consent of parties, by a writing under seal of equal solemnity with the original instrument.<sup>3</sup> The power of sale should be expressed in plain terms, but no particular form is necessary, and a power of sale may arise by implication, as where a duty is imposed upon a trustee which he cannot perform without selling;<sup>4</sup> and the right to sell implies the right to

*Turner v. Johnson*, 7 Ohio, 216, 220; *Elliott v. Wood*, 45 N. Y. 71; *Hyde v. Warren*, 46 Miss. 13; *Richmond v. Hughes*, 9 R. I. 228.

<sup>1</sup> *Wallis v. Thornton*, 2 Brock. 422; *Demall v. Morgan*, 5 Call, 417; *Wilson v. Troup*, 7 Johns. Ch. 25; *Ormsby v. Tarascon*, 3 Litt. 410; *Williams v. Otey*, 8 Humph. 518; *Walker v. Brungbad*, 13 Sm. & M. 723. See *ante*, §§ 511 *a*, 511 *b*, 511 *c*, and 764-787.

<sup>2</sup> *Brisbane v. Stoughton*, 17 Ohio, 482.

<sup>3</sup> *Baldrige v. Walton*, 1 Mo. 520.

<sup>4</sup> *Post*, § 766; *Purdie v. Whitney*, 20 Pick. 25; *Williams v. Otey*, 8 Humph. 563; *Munday v. Vattier*, 3 Grat. 518; *Linton v. Boly*, 12 Mo. 567; *Goodrich v. Proctor*, 1 Gray, 567. See *Wing v. Cooper*, 37 Vt. 169; *Hyman v. Devereux*, 63 N. C. 624.

convey.<sup>1</sup> So the mortgagee may bind himself to execute any other power or perform some other act, as to convey the land to some other person or to the mortgagor's wife upon the payment of the mortgage debt.<sup>2</sup> The power to sell may be made to depend upon almost any circumstance, as upon default in payment of the taxes by the mortgagor.<sup>3</sup> A condition may be annexed to the power that the mortgagor shall concur in the sale, and join in the deed.<sup>4</sup>

§ 602 *h.* It is a universal rule that a power coupled with an interest is irrevocable; and as a power of sale inserted in a mortgage or contained in a deed of trust to a creditor to secure a debt or to a third person for his benefit, is a power coupled with an interest, it cannot be revoked by any act of the grantor or donor of the power. Not even the death or insanity of the grantor or donor will annul the power or suspend its exercise. The debt remains, the right or lien on the property remains, and the power is coupled with them. In other words, the power is annexed to the property, and is an irrevocable part of the security, and goes with it.<sup>5</sup> The mortgagor cannot disseize the mortgagee by an exclusive possession in such manner as to defeat the power of sale.<sup>6</sup>

<sup>1</sup> *Williams v. Otey*, 8 Humph. 563; *Fogarty v. Sawyer*, 17 Cal. 589.

<sup>2</sup> *Blount v. Carroway*, 67 N. C. 396.

<sup>3</sup> *Pope v. Durant*, 26 Iowa, 233.

<sup>4</sup> *Kissam v. Dierkes*, 49 N. Y. 602.

<sup>5</sup> *Ante*, § 593; *Wiswall v. Ross*, 4 Port. (Ala.) 328; *Bergen v. Bennett*, 1 Caines, Cas. in Er. 1; *Wilson v. Troup*, 7 Johns. Ch. 25; *Wilbur v. Spofford*, 4 Sneed, 698; *Hyde v. Warren*, 46 Miss. 13; *Berry v. Skinner*, 30 Md. 567; *Collins v. Hopkins*, 7 Clarke (Iowa), 463; *Bancroft v. Ashhurst*, 2 Grant's Cas. 513; *Hannah v. Carrington*, 18 Ark. 104; *Beattie v. Butler*, 21 Mo. 313; *Walker v. Crowder*, 2 Ired. Eq. 478; *Stimpson v. Fries*, 2 Jones, Eq. 156; *Doe v. Duval*, 1 Ala. 745. In *Robertson v. Paul*, 16 Tex. 472, and 26 Tex. 205, the court admitted these general principles, but thought that powers of sale to be executed after the death of a donor were inconsistent with the statutes authorizing the settlement of the estates of deceased persons. *Buchanan v. Monroe*, 22 Tex. 587; *Brewer v. Winchester*, 2 Allen, 389; and see *Encking v. Simmons*, 28 Wis. 272, where a sale was set aside for the reason that the mortgagor was insane and the price very low.

<sup>6</sup> *Sheridan v. Welch*, 8 Allen, 166.

A mere power of attorney, however, from a debtor to a creditor, authorizing him to sell property, and, after deducting the amount due to himself, to account for the balance, is a naked power, revocable at the will of the donor. Such a power is not connected with the estate, and is no part either of the estate or the debt due.<sup>1</sup>

§ 602 *i*. The mortgagee in a deed of mortgage and the trustee in a deed of trust take the *legal* title and estate for the purposes of their security. In all cases the legal title is in the trustee under the trust-deed, if the deed purports to convey the estate.<sup>2</sup> Such a title, however, is defeasible upon the performance by the grantor of the obligations undertaken by him. Performance of the conditions of the deed on the part of the grantor, or tender of performance before the sale, will defeat the power of sale in a mortgage or deed of trust. Such performance or tender extinguishes the power; and a sale afterwards under the power, even to an innocent purchaser, will be void.<sup>3</sup>

§ 602 *j*. In law, a mortgage is considered, as between the mortgagor and mortgagee, and so far as it is necessary to give full effect to the mortgage as a security for the performance of the condition, as a conveyance in fee. But for all other purposes it is considered, especially until entry for condition broken, as a mere charge or incumbrance, which does not divest the estate of the mortgagor. He is deemed seized so far that he can convey it subject to the mortgage; he may make a second mortgage; it may be attached for his debts; he is considered as having all the rights and powers

<sup>1</sup> *Mansfield v. Mansfield*, 6 Conn. 559.

<sup>2</sup> *White v. Whitney*, 3 Met. 81; *Greenleaf v. Queen*, 1 Pet. 138; *Morris v. Way*, 16 Ohio, 469; *Anderson v. Holloman*, 1 Jones, L. 169; *Thornhill v. Gilmer*, 4 Sm. & M. 153; *Brown v. Bartie*, 10 Sm. & M. 268, 275; *Sargent v. Howe*, 21 Ill. 148; *Hannah v. Carrington*, 18 Ark. 85; *Taylor v. King*, 6 Munf. 358; *Newman v. Jackson*, 12 Wheat. 570.

<sup>3</sup> *Cook v. Dillon*, 9 Iowa, 407; *King v. Merchants' Ex. Co.*, 1 Seld. 547; *Cameron v. Irwin*, 5 Hill, 272; *Deyo v. Van Valkenburg*, id. 246; *Wood v. Colvin*, 2 id. 566.

of an owner, except so far as it is necessary to hold otherwise in order to give effect to the mortgage. The interest of a mortgagor is therefore regarded as an estate; though, in legal strictness and as against the mortgagee, it is an equity of redemption. It may be levied upon and seizin delivered by the officer; in which case the creditor will hold in fee subject to the mortgage. The same principles apply to the rights and title of the grantor in deeds of trust.<sup>1</sup>

§ 602 k. The legal estate being thus in the mortgagee or trustee for the purpose of the security, the power of sale is a power appendant to the estate itself, and takes effect out of it.<sup>2</sup> If the mortgagee or trustee ceases in any way to have an interest in the estate, he ceases to have any power over it. If, therefore, they totally alienate the estate to which the power is appendant, they extinguish the power.<sup>3</sup> If a trustee conveys the property, even in breach of the trust, he extinguishes his power, and a subsequent sale will be void.<sup>4</sup> But a court of equity can give relief from fraud and breaches of trust. If, however, a trustee has sold the property in breach of the trust, and he afterwards obtains the legal title, the old trust will reattach to it in his hands, and he may again have a power of sale as a part of the terms of the trust.<sup>5</sup>

§ 602 l. The trustee, or mortgagee with a power of sale, holds the lands in trust for the purposes for which the deeds

<sup>1</sup> *White v. Whitney*, 3 Met. 81; *Harrison v. Battle*, 1 Dev. Eq. 541; *Poole v. Glover*, 2 Ired. L. 129; *Anderson v. Jones*, 1 Jones, Law, 169. The text states the prevailing rule in the majority of States. *McGregor v. Hall*, 3 Stew. & Por. 397; 4 Kent, 160, 161, 195, n. If the trustee make a sale, and there is a surplus, the wife of the grantor is entitled to dower in it as in an equity of redemption. In a few States, — Mississippi, Ohio, Arkansas, and perhaps others, — this equity of the grantor in a deed of trust cannot be reached at law. A creditor is compelled to have resort to a proceeding in equity.

<sup>2</sup> *Post*, § 765; *Alger v. Fay*, 12 Pick. 322.

<sup>3</sup> 1 Sugd. Pow. 54.

<sup>4</sup> *Huckabee v. Billingsby*, 16 Ala. 414; *Hogan v. Lepretre*, 1 Port. 392; *Doe v. Robinson*, 24 Miss. 688.

<sup>5</sup> *Salisbury v. Bigelow*, 20 Pick. 174.

are made, which purposes are generally specified in the deeds themselves. The trusts are, generally, (1) to sell the lands upon default of payment in the manner pointed out in the deed; (2) to apply so much of the proceeds of the sale as is necessary to the payment of the debts secured by the deeds; and (3) to account for and pay over the balance, after paying the expenses of the trust and the sale to the grantor or mortgagor, his legal representatives or assigns. The interest of the mortgagee with a power of sale is the same as the interest of the other mortgagees under the old form of mortgage; and the *cestuis que trust* under deeds of trust have a mere equitable interest, which can only be enforced in equity. Neither the interests of mortgagees nor of *cestuis que trust* can be reached at law by the levy of execution; but proceedings must be in equity for such purposes.<sup>1</sup>

§ 602 *m.* The trustee, in a deed of trust for security, is subject to the same rules that govern all trustees. He may refuse the office, as no one is compelled to accept a trust;<sup>2</sup> but if he once accepts the trust, or does any acts, he cannot abandon it without the consent of all parties in interest or the decree of the court.<sup>3</sup> In all cases of a trust or power coupled with an interest, the power survives so long as the interest survives, and it goes with the interest and the estate.<sup>4</sup> If a part of the trustees named in a deed refuse to accept, or die or resign, those who accept the trust and survive can execute the trust, even to the last one.<sup>5</sup> Upon the death of

<sup>1</sup> 4 Kent, Com. 159, 160; *McIntire v. Agricultural Bank*, 1 Freem. Ch. 105; *Harrison v. Battle*, 1 Dev. Eq. 541; *Jenks v. Alexander*, 11 Paige, 619, 624; *Leonard v. Ford*, 8 Ired. L. 418; *McGregor v. Hale*, 3 Stew. & Por. 408.

<sup>2</sup> *Ante*, § 259.

<sup>3</sup> *Ante*, §§ 94, 268; *Drane v. Gunter*, 19 Ala. 731; 3 Yerg. 307; 21 Ill. 148.

<sup>4</sup> *Ante*, §§ 502, 503, 505.

<sup>5</sup> *Williams v. Otey*, 8 Humph. 562; *Taylor v. Benham*, 5 How. 233; *Scull v. Reeves*, 2 Green, Ch. 84; *Hannah v. Carrington*, 18 Ark. 104; *Parsons v. Boyd*, 20 Ala. 118; *Franklin v. Osgood*, 14 Johns. 527; *Robertson v. Gaines*, 2 Humph. 367; *In Matter of Stevenson*, 3 Paige, 420; *Hawkins v. May*, 12 Ala. 672; *Peters v. Beverly*, 10 Peters, 532.

the last trustee, the estate descends to his heirs,<sup>1</sup> but the court can appoint new trustees; and in many States there are statutes that vest the estate and all powers that are appendant to the estate in the new trustee;<sup>2</sup> if there are no such statutes, courts can order the heirs to convey the estate to the new trustees.<sup>3</sup> The same rules apply to the appointment of new trustees under deeds of trust that apply to the removal and appointment of trustees in any other case.<sup>4</sup> So the same rules apply in relation to the concurrence of all the trustees in the execution of the trust,<sup>5</sup> and to the liabilities of the trustees for the acts of their cotrustees.<sup>6</sup> Nor can they delegate their power.<sup>7</sup> The creditors are the *cestuis* and may sue for waste or mismanagement.<sup>8</sup>

§ 602 n. Powers of sale contained in a mortgage deed stand upon somewhat different principles. A mortgage is personal assets, and goes to the administrator or executor; the right to foreclose the mortgage goes to the administrator, with the debt, and also the power of sale contained in the mortgage. Therefore the administrator or executor of a deceased mortgagee with a power of sale may or must execute the power of sale if it is necessary to resort to the power to collect the debt or enforce the mortgage.<sup>9</sup> And it is said that this power of sale is in an administrator by virtue of his being named in the deed of mortgage, and by virtue of an appointment in any jurisdiction; so that, if the mortgagee was a non-resident, and his administrator is appointed by a court foreign to the State in which the land is situated,

<sup>1</sup> *Ante*, §§ 273, 341; *Mauldin v. Armstead*, 14 Ala. 708.

<sup>2</sup> *Ante*, § 284; *Woolridge v. Planters' Bank*, 1 Sneed, 297; *Goss v. Singleton*, 2 Head, 67; *Duffy v. Calvert*, 6 Gill, 487; *Gibbs v. Marsh*, 2 Met. 243, 253.

<sup>3</sup> *Ante*, § 284; *Greenleaf v. Queen*, 1 Pet. 138.

<sup>4</sup> See *ante*, § 275 *et seq.*

<sup>5</sup> *Ante*, § 411.

<sup>6</sup> *Ante*, § 405.

<sup>7</sup> *Ante*, § 401.

<sup>8</sup> *Cohen v. Morris*, 70 Ga. 313.

<sup>9</sup> *Ante*, §§ 338, 495; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Collins v.*

the administrator may execute the power and convey the land.<sup>1</sup> Powers of sale differ from deeds of trust in another respect. Ordinarily a trustee cannot assign or delegate his trust, or its duties or powers, to another, and it is a breach of the trust to attempt to do so; but powers of sale in a mortgage may be assigned with the debt and the mortgage, and such assignee of the mortgage may execute the power of sale.<sup>2</sup> If the mortgagee assigns the debt for which the mortgage is security, but does not assign the mortgage deed, in equity he holds the security and the power of sale in trust for the assignee of the debt, and the assignee may call upon him to execute the power;<sup>3</sup> and if he assigns a part of the debts, or a part of the notes secured by the mortgage, he holds the security and the power in trust *pro tanto*.<sup>4</sup> But the partial assignee of a mortgage cannot execute the power of sale, as the power is not divisible.<sup>5</sup>

§ 602 *o*. Trustees and mortgagees, in the execution of their powers, must use the utmost good faith toward all parties in interest. This proposition cannot be too strongly stated and enforced. They must act impartially for every person who has any rights in the estate. If they allow the debtor to take the rents and profits of the estate they hold for the benefit of creditors, they will become personally liable to the creditors.<sup>6</sup> They must use every effort to sell the estate under every possible advantage of time, place, and publicity. They must exercise their discretion, so far as

Hopkins, 7 Iowa, 463; *Turner v. Johnson*, 7 Ohio, 216, 220; *Brewer v. Winchester*, 2 Allen, 389; *Varnum v. Meserve*, 8 id. 158; *Anderson v. Austin*, 34 Barb. 319; *Harnickell v. Orndorff*, 35 Md. 341.

<sup>1</sup> *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Baldwin v. Allison*, 4 Minn. 25.

<sup>2</sup> *Ante*, §§ 338, 495; *Strother v. Law*, 54 Ill. 413.

<sup>3</sup> *Sargent v. Howe*, 21 Ill. 148; *Keyes v. Wood*, 21 Vt. 331, 550; *Andersan v. Baumgartner*, 27 Mo. 80; *Wood v. Snow*, 1 Mich. 128; *Slee v. Manhattan Co.*, 1 Paige, 48; *Wilson v. Troup*, 1 Johns. Ch. 25; 2 Cowen, 195; *Lacas v. Harris*, 20 Ill. 165; *Trustee, &c. v. Prentiss*, 29 Miss. 46; *Hinds v. Mooers*, 11 Iowa, 211; *Sangster v. Love*, id. 580.

<sup>4</sup> *Ibid*.

<sup>5</sup> *Wilson v. Troup*, 7 Johns. Ch. 25; 2 Cow. 195.

<sup>6</sup> *Ely v. Turpin*, 75 Mo. 83.

they have any, in an intelligent and reasonable manner. A mortgagee is bound, in the exercise of his power, not to use it to oppress the debtor, nor to sacrifice the estate. If he unfairly or unnecessarily prejudices the rights or interests of the mortgagor, or any other party, the sale may be set aside, as he may be made personally responsible for the injury.<sup>1</sup> The creditors cannot make the trustee their agent to purchase the property to the best advantage, for he owes a duty to the debtor and those claiming through him any residue after the debts are satisfied. The creditors may, however, send the trustee their bid, and he may sell the land to them if no one else bids more.<sup>2</sup> After the power has been exercised, the mortgagee may bring a suit to recover any balance due to him after applying the proceeds of the sale; but the mortgagor may defend such suit, if he can show that the sale was unfairly or fraudulently conducted,<sup>3</sup> and this he may do although he may still have a right to redeem.<sup>4</sup>

§ 602 *p.* It must be constantly borne in mind that the power of sale given in the deed or mortgage must be strictly followed in all its details. The power of transferring the property of one man to another must be followed strictly, literally, and precisely. Such a power admits of no substitution and of no equivalent, even in unimportant details. If the power contains the details, the parties have made them important; and no change can be made even if the mortgagor would be benefited thereby, nor if a statute provides a different manner. If the power is not executed as it is given in

<sup>1</sup> See *post*, § 770, and cases cited; *Howard v. Ames*, 3 Met. 311; *Matthie v. Edwards*, 2 Coll. 465; *Hobson v. Bell*, 2 Beav. 17; *Goldsmith v. Osborne*, 1 Edw. Ch. 561; *Driver v. Fortner*, 2 Port. (Ala.) 9; *Prewett v. Laud*, 36 Miss. 495; *Richards v. Holmes*, 18 How. 143; *Lane v. Tidhall*, 1 Gilm. (Va.) 132; *Quarles v. Lacy*, 4 Munf. 251; *Singleton v. Scott*, 11 Iowa, 589, 597; *Jenks v. Alexander*, 11 Paige, 619; *Hunt v. Ball*, 2 Dev. Eq. 292; *Johnson v. Eason*, 3 Ired. Eq. 330; *Rossett v. Fisher*, 11 Grat. 492; *Outwater v. Berry*, 2 Halst. Eq. 63.

<sup>2</sup> *Seesel v. Ewan*, 35 Ark. 127.

<sup>3</sup> *Howard v. Ames*, 3 Met. 311; *Sabin v. Stickney*, 9 Vt. 164.

<sup>4</sup> *Lowell v. North*, 4 Min. 32.



all particulars, it is not executed at all, and the mortgagor still has his equity of redemption. And so, if a statute of a State regulates the execution of these powers of sale, they must be executed as they are created in the deed and as they are regulated by the statute. When one mode of executing such powers is pointed out in the deed, and such mode is regulated by statute, all other modes of executing the power are negatived and excluded.<sup>1</sup> If, however, the power is a general power, and no modes of executing it are pointed out in the power, it is an authority to execute the power in any legal mode.<sup>2</sup> Thus a power to *sell* on default will not authorize a lease or mortgage.<sup>3</sup> If the trustee is to sell partly for cash and partly on credit, he cannot sell wholly for credit.<sup>4</sup> If the power is to sell for the amount then due at the time of the sale, a sale for more will be void.<sup>5</sup> But a sale to be made in default of payment of interest when due, may be made for the whole amount of the debt.<sup>6</sup> If the sale is to be at public auction, a private sale will be set aside.<sup>7</sup> If the power authorizes sureties to sell before they have paid the debt or have been damnified, they can do so; but if they become the purchasers, they will hold the property upon the original trust or mortgage, and the mortgagor may redeem:<sup>8</sup>

<sup>1</sup> *Post*, §§ 511 *a*, 511 *b*, 511 *c*, 770-785; *Greenleaf v. Queen*, 1 Pet. 138; *Waldron v. Chastney*, 2 Blatchf. 62; *Gunter v. Jones*, 10 Cal. 643; *Taylor v. Atkins*, 1 Burr. 60; *Ormsby v. Tarascon*, 3 Litt. 405; *Hawkins v. Kemp*, 3 East, 410; *Crosby v. Heston*, 1 Tex. 225; *Bush v. Stamps*, 26 Miss. 463; *Gray v. Howard*, 14 Mo. 341; *Foster v. Goree*, 4 Ala. 428; *Beebe v. De Baum*, 3 Eng. 510; *Stine v. Wilkson*, 10 Mo. 75; *Baldrige v. Walton*, 1 Mo. 520; *Smith v. Provin*, 4 Allen, 514; *Griffin v. Marine Co.*, 52 Ill. 130; *Elliott v. Wood*, 53 Barb. 285; *Hall v. Towne*, 45 Ill. 493.

<sup>2</sup> *Foster v. Goree*, 4 Ala. 428; 1 Sugd. Pow. 266.

<sup>3</sup> *Post*, §§ 768, 769; *Walker v. Brungard*, 13 Sm. & M. 723; 4 Kent, Com. 148; *Sparks v. Kearney*, 2 Jones, Eq. 481.

<sup>4</sup> *Norman v. Hill*, 2 Pat. & H. 676.

<sup>5</sup> *Ormsby v. Tarascon*, 3 Litt. 405.

<sup>6</sup> *Richards v. Holmes*, 18 How. 143.

<sup>7</sup> *Greenleaf v. Queen*, 1 Pet. 138.

<sup>8</sup> *Thurston v. Prentiss*, 1 Mich. 194, *Walker Ch.* 529; *Hawkins v. May*, 12 Ala. 673, 5 Porter, 191; *Roden v. Jaco*, 17 Ala. 344; *Wheeler v. Stone*, 4 Gill, 38.

and powers of sale may be executed to secure future advances, but the exact terms of the mortgage and the power must be complied with, and the rights of intervening parties or interests cannot be defeated.<sup>1</sup> If there are conditions precedent, they must all be strictly complied with and performed before a sale can be made.<sup>2</sup> So the execution of the deed under the power must correspond to the power. If the trustee is to execute the deed as the attorney of the debtor, he cannot execute in his own name.<sup>3</sup> The original purchaser under the power will be held to have notice of all the irregularities of the proceedings of sale, and his deed will be void; but remote purchasers will take a good title, unless they can be affected with notice of the irregularities attending the sale.<sup>4</sup>

§ 602 *q.* Powers may authorize sales to be public or private, and they must be executed as they are given. In the absence of any directions upon the subject, the sale may be either public or private, as circumstances render it for the advantage of the estate,<sup>5</sup> unless there are statutes that require all sales under powers to be at public auction.<sup>6</sup> If the form of notice, and the manner of giving it, whether by posting in public places or by advertising in a newspaper, are prescribed in the power, they must be strictly followed: and if the particular place of notice is named, notice must be posted in that place; if the newspaper is named, publication of notice must be made in that paper. It is not necessary to give other notice of the sale than that prescribed in the power, but it is necessary to follow the power in good

<sup>1</sup> *Curling v. Shuttleworth*, 6 Bing. 121.

<sup>2</sup> *Post*, §§ 784, 785; *Roarty v. Mitchell*, 7 Gray, 243; *Dutton v. Cotton*, 10 Iowa, 408. Where the power was that, in case of default in payment, the mortgagor might enter and take possession and sell, it was held that he could not sell without making an entry and taking possession. *Roarty v. Mitchell*, 7 Gray, 243.

<sup>3</sup> *Speer v. Hadduck*, 31 Ill. 439. As to the forms of executing powers in general, see *ante*, §§ 511 *a*, 511 *b*, 511 *c*.

<sup>4</sup> *Hamilton v. Lubukee*, 51 Ill. 415.

<sup>5</sup> *Post*, §§ 780-782.

<sup>6</sup> *Lawrence v. Farmers', &c. Co.*, 3 Kern. 200, 210.

faith.<sup>1</sup> If the notice named in the power cannot be given, as if the newspaper named has ceased to be published, the mortgagee cannot sell without recourse to a court of equity.<sup>2</sup> If the form of notice and manner of giving it are not prescribed, the mortgagee must give a proper notice in a reasonable manner; and if he fails to do so, the sale will be set aside.<sup>3</sup> If no particular form is prescribed, no particular form is required.<sup>4</sup> But it should be sufficient to identify the land and to invite competition.<sup>5</sup> In Massachusetts, it has been held that the notice should state the name of the owner of the land, or of the equity of redemption, and also of the holder of the mortgage, especially if the original mortgagor has sold his equity of redemption, or if the original mortgagee has assigned the mortgage; and a sale under a notice which did not give this full information was set aside.<sup>6</sup> If no specific directions are given in the power as to where notices are to be posted, or in what newspapers publication is to be made, the mortgagee must use a fair and honest discretion in posting the notices, or in selecting the newspaper in which to insert notice of the sale. If the notices of sale were posted in remote or isolated places, where they would be seen by few persons and where they could give no publicity to the sale and invite little competition, or if they were inserted in an obscure newspaper, in an obscure manner, or if they were inserted in a remote newspaper, it would be strong evidence of fraud, and the sale would be set aside.<sup>7</sup> If several lots in different counties are embraced in the same deed, notice of the sale must be given in different counties.<sup>8</sup>

<sup>1</sup> *Ormsby v. Tarascon*, 3 Litt. 405, 411; *Crocker v. Robertson*, 8 Clarke (Iowa), 404.

<sup>2</sup> *Dutton v. Cotton*, 10 Iowa, 408.

<sup>3</sup> 4 Kent, Com. 490; *Anon.* 6 Madd. 15.

<sup>4</sup> *Post*, § 782.

<sup>5</sup> *Ibid.*

<sup>6</sup> See *Hoffman v. Anthony*, 6 R. I. 282.

<sup>7</sup> *Singleton v. Scott*, 11 Iowa, 589; *Newman v. Jackson*, 12 Wheat. 570; *Johnson v. Eason*, 3 Ired. Eq. 530; *Jenks v. Alexander*, 11 Paige, 619; 2 Am. L. Rev. (N. S.) 719.

<sup>8</sup> *Wells v. Wells*, 47 Barb. 416. But see *Berthold v. Holmes*, 12 Minn. 335.

§ 602 *r.* The notice of the sale must be certain as to *time* and *place* of sale,<sup>1</sup> and the description must be sufficient to apprise the public of what property is to be sold.<sup>2</sup> Mere clerical errors or inaccuracies or omissions in a notice, which do not mislead or which correct themselves on their face, will not vitiate a sale.<sup>3</sup> Notice of sale on the "28th of December next," omitting the year, was held good;<sup>4</sup> notice of a sale "at the town of St. Joseph" was held good, the town being small, and no injury having been done; notice of sale at "City Hall," or "Merchants' Exchange," or any other public place, is good, if the sale is actually made in that part of such buildings or place where sales are usually made.<sup>6</sup> If the power provides that the sale shall be on the premises, or names any other place, of course the sale must be notified for that place, and it must be made at that place. Notice for sale on the 23d of May was changed to the 25th, without the debtor's knowledge. He attended on the 23d; but the sale was made on the latter day, and it was held to be void.<sup>7</sup> It is usual to specify the precise hour of the sale, and probably a notice that did not state the hour of the sale would be bad;<sup>8</sup> but a notice specifying a day, between twelve and five of the clock, in the absence of any unfair practice, was held good.<sup>9</sup> Where a notice of sale was given for Friday the 17th, but Friday was the 16th, and the correction was made on Friday the 16th, it was held to be void.<sup>10</sup> In Massachusetts, a sale upon notice to be published three weeks

<sup>1</sup> *Burnett v. Denniston*, 5 Johns. Ch. 35; *Gray v. Howard*, 14 Mo. 341; *Dana v. Farrington*, 4 Minn. 437.

<sup>2</sup> *Newman v. Jackson*, 12 Wheat. 570; *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64.

<sup>3</sup> *Ibid.*; *White v. Malcomb*, 15 Md. 529; *Rathburn v. Clark*, 9 Abbott, Pr. (N. Y.) 12, 66, n.

<sup>4</sup> *Gray v. Howard*, 14 Mo. 341.

<sup>5</sup> *Beattie v. Butler*, 26 Mo. 313.

<sup>6</sup> *Harmon v. Carver*, 12 How. Pr. (N. Y.) 490.

<sup>7</sup> *Dana v. Farrington*, 4 Minn. 433. And so where a mistake was made in the year. *Fenner v. Tucker*, 6 R. I. 557.

<sup>8</sup> *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64.

<sup>9</sup> *Cox v. Halstead*, 1 Green, Ch. 311.

<sup>10</sup> *Wellman v. Lawrence*, 15 Mass. 326; *Fenner v. Tucker*, 6 R. I. 551.

successively in a newspaper, is good, although made less than three weeks from the time of the first publication, provided there has been a publication of the notice three successive weeks before the sale.<sup>1</sup> In New York, if a notice is to be given once in each week for twelve successive weeks, the first publication must be eighty-four days, or twelve full weeks, before the day of the sale.<sup>2</sup> If thirty days' notice is required, there need not be thirty days between the first and last publication, but thirty days between the first publication and the day of the sale. The publication of the notice must be continued for the requisite time.<sup>3</sup> Where twenty days' notice in two daily newspapers was required, it was held not to be necessary that daily notice should be given in each newspaper.<sup>4</sup>

§ 602 s. All the statements made in the notice, or required to be stated in a notice, must be stated truly and according to the facts. Thus, where the notice stated that the premises were to be sold for default upon three mortgages, and there were but two, the equity of redemption was not bound.<sup>5</sup> The power is to sell the estate, not the equity of redemption, although the sale operates as a foreclosure; and the notice must state that it is to be a sale of the estate, and not of the mere equity of redemption,<sup>6</sup> but the mortgagee in a junior power of sale mortgage cannot sell the entire estate, free from incumbrances of prior mortgages, without consent of the holders of such prior mortgages.<sup>7</sup> If neither the power nor any statute requires the amount of the

<sup>1</sup> *Frothingham v. March*, 1 Mass. 247.

<sup>2</sup> *Bunce v. Reed*, 16 Barb. 350; *Early v. Doe*, 16 How. 610; *Howard v. Hatch*, 29 Barb. 297; *Worley v. Naylor*, 6 Minn. 192.

<sup>3</sup> *Bunce v. Reed*, 16 Barb. 350; *Stine v. Wilkson*, 10 Mo. 75; *Leffer v. Armstrong*, 4 Iowa, 482.

<sup>4</sup> *White v. Malcomb*, 15 Md. 529. See also *Johnson v. Dorsey*, 7 Gill, 286; *Gibbs v. Cunningham*, 1 Md. Ch. 44.

<sup>5</sup> *Bennett v. Denniston*, 5 Johns. Ch. 35; *Johnson v. Turner*, 7 Ohio, 216; *Matthie v. Edwards*, 2 Coll. 465.

<sup>6</sup> *Merrill v. Fowle*, 10 Allen, 350.

<sup>7</sup> *Donohue v. Chase*, 130 Mass. 139.

claim or debt, for which the sale is made, to be stated, it need not be stated in the notice, and the sale will not be affected by such omission;<sup>1</sup> but if such statement in the notice is required by the power or by a statute, the amount of the debt must be stated with substantial accuracy;<sup>2</sup> or if, not being required, a greatly exaggerated claim should be fraudulently stated in the notice, the sale would not bar the equity of redemption.<sup>3</sup> So, if the sale is proposed to be made for more than is due to the creditor, equity will restrain the sale;<sup>4</sup> and, if actually made, it will be set aside.<sup>5</sup>

§ 602 *t.* If the notices of sale are not made and published according to the power, the sale is absolutely void, not merely voidable, and no title passes to the purchasers. This is upon the ground that the power was not executed according to the terms of it upon its face;<sup>6</sup> and so if a sale is made upon a wrong day or at a wrong place.<sup>7</sup> After the lapse of a long time, however, courts will presume that everything was correctly done which the power or the law required to be done,<sup>8</sup> and the mortgagor or grantor and his privies in blood or estate, or the parties having a right in the estate, can alone object to any defects in the proceedings. Strangers have no rights in the estate, and cannot take advantage of such informalities for any purpose.<sup>9</sup>

<sup>1</sup> *Wiswall v. Ross*, 4 Port. (Ala.) 321.

<sup>2</sup> *Burnett v. Denniston*, 5 Johns. Ch. 35; *Johnson v. Turner*, 7 Ohio, 216.

<sup>3</sup> *Klock v. Cronkhite*, 1 Hill, 107; *Jenks v. Alexander*, 11 Paige, 619; *Bunce v. Reed*, 16 Barb. 347; *Spencer v. Anon.*, 4 Minn. 544; *Ramsey v. Merriam*, 6 Minn. 168.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Bunce v. Reed*, 16 Barb. 350; *Baldrige v. Walton*, 1 Mo. 520; *Gibson v. Jones*, 5 Leigh, 370; *Jackson v. Clark*, 7 Johns. 217, 226; *Bigler v. Walker*, 14 Wall. 297.

<sup>7</sup> *Miller v. Hull*, 4 Denio, 104; *Dana v. Farrington*, 4 Minn. 433.

<sup>8</sup> *Bergen v. Bennett*, 1 Caines' Cas. 1; *Demarest v. Wynkoop*, 3 Johns. Ch. 129.

<sup>9</sup> *Edmondson v. Walsh*, 27 Ala. 578; *Wightman v. Doe*, 24 Miss. 675; *Casy v. Colvin*, 11 Ala. 514; *Hellegas v. Hellegas*, 5 Barr, 97; *Franklin v. Greene*, 2 Allen, 519.

§ 602 u. If an adjournment of the sale is not prohibited by the power, the donee of the power may adjourn the sale to another time and to another place. Such power is implied. Of course it is a discretionary power, and must be exercised in good faith; it may be the clear *duty* of the trustee to adjourn the sale, and evidence of bad faith not to adjourn; as if there are few or no purchasers present, and the bids are very low and inadequate to the value of the property.<sup>1</sup> The adjournment should regularly be made at the time and place of sale; public proclamation should be made of it at the time; and if there is nothing in the power or in any statute, the same notice of sale should be given as was given in the first instance,<sup>2</sup> except that it need not be for the same length of time;<sup>3</sup> but the adjournment made on the premises and the published notice of it should correspond.<sup>4</sup> If notice of an intended adjournment should be published, and the sale should notwithstanding be made on the day originally appointed, it would be void.<sup>5</sup>

§ 602 v. It is necessary to repeat, on every occasion, that a trustee for sale, and a mortgagee with a power of sale, or the assignee cannot execute the trust or the power in favor of themselves.<sup>6</sup> A trustee cannot purchase the trust property directly or indirectly, nor can the mortgagee, under a power of sale mortgage, purchase directly or indirectly. He

<sup>1</sup> *Richard v. Holmes*, 18 How. 143; *Jackson v. Clark*, 7 Johns. 217, 225; *Sayles v. Smith*, 12 Wend. 57; *Miller v. Hall*, 4 Denio, 104; *Baldridge v. Walton*, 1 Mo. 520.

<sup>2</sup> *Richard v. Holmes*, 18 How. 147; *Johnson v. Eason*, 3 Ired. Eq. 366. If a postponement is duly proclaimed at the time and place advertised for the sale, new notices need not be given in any State. *Cox v. Halstead*, 1 Green, Ch. 311; 1 Stockt. 287. But a postponement may be made before the day of sale arrives. *Bennett v. Brundage*, 8 Minn. 432.

<sup>3</sup> *Jackson v. Clark*, 7 Johns. 217, 225; *Dana v. Farrington*, 4 Minn. 433.

<sup>4</sup> *Miller v. Hull*, 4 Denio, 104; *Cole v. Moffit*, 2 Barb. 18; *Sayles v. Smith*, 12 Wend. 57; *Westgate v. Handlin*, 7 How. Pr. (N. Y.) 372.

<sup>5</sup> *Jackson v. Clark*, 7 Johns. 217.

<sup>6</sup> *Ante*, §§ 254, 511 a, 511 b, 511 c, 787; *Allen v. Chatfield*, 8 Minn. 455; *Mapps v. Sharpe*, 32 Ill. 13; *Griffin v. Marine Co.*, 52 Ill. 130.

cannot purchase for himself, nor can any one purchase for him, nor can he purchase as agent for any third person. Nor can any agent, auctioneer, attorney, or other person employed in the selling of the estate, purchase it for the mortgagee or for themselves or for any other person.<sup>1</sup> (a) There is so much danger of fraud or collusion, and it is so difficult to trace and expose them, in the execution of such powers, that the law has placed almost an absolute prohibition in the front of such an execution of trusts or powers.<sup>2</sup> If, however, a trustee or mortgagee buys in a prior mortgage, he will hold it in trust for the *cestui que trust* or mortgagor, with the right of being reimbursed for so much as he fairly paid for such mortgage.<sup>3</sup> If a trustee or mortgagee purchases the property thus within his power to sell, and the title is conveyed to him, either directly or indirectly, through a third person, he will continue to hold the property upon the old trust, or the mortgagor may redeem. The execution of the trust or the foreclosure of the mortgage has not been advanced.<sup>4</sup> The *cestui que trust* may, however, buy in the property.<sup>5</sup> And so the power itself may authorize

<sup>1</sup> *Ante*, §§ 195, 199, and cases cited; *Arnot v. McClure*, 4 Denio, 41; *Hall v. Towne*, 45 Ill. 493; *Jackson v. Calden*, 4 Cow. 266; *Huff v. Earle*, 3 Port. (Ind.) 306; *Nichols v. Baxter*, 5 R. I. 491; *Parmenter v. Walker*, 9 R. I. 225; *Hyndman v. Hyndman*, 19 Vt. 9; *Pettibone v. Perkins*, 6 Wis. 616; *Bailey v. Robinson*, 1 Grat. 4; *Robinson v. Butler*, 24 Ill. 387; *Saltmarsh v. Burn*, 4 Port. 283; *Blackley v. Fowler*, 21 Cal. 326; *Jeffersonville Assoc. v. Fisher*, 7 Port. (Ind.) 699; *Bunce v. Reed*, 16 Barb. 347; *Sabin v. Stickney*, 9 Vt. 164; *Field v. Arrowsmith*, 3 Humph. 442; *Hunt v. Bass*, 2 Dev. Eq. 292; *Hester v. Hester*, 3 Ired. Eq. 330; *Scott v. Gamble*, 1 Stockt. 218; *Remick v. Butterfield*, 11 Foster, 70; *Winter v. Geroe*, 1 Halstead, Ch. 319; *Armstrong v. Campbell*, 3 Yerger, 201; *Ringgold v. Ringgold*, 1 Har. & Gill, 11. But it is said that such sale by the mortgagee to himself is not void, but voidable only, at the instance of the mortgagor. *Robinson v. Cullom*, 41 Ala. 693; *Thornton v. Irwin*, 43 Mo. 153.

<sup>2</sup> *Ante*, §§ 195-197.

<sup>3</sup> *Critchfield v. Haynes*, 14 Ala. 49; *Gunter v. Jones*, 9 Cal. 643; *Jones v. Dawson*, 9 Ala. 672.

<sup>4</sup> *Hyndman v. Hyndman*, 19 Vt. 1; *Benham v. Rowe*, 2 Cal. 387.

<sup>5</sup> *Lyons v. Jones*, 6 Humph. 533; *Wade v. Harper*, 3 Yerger, 333;

(a) See *supra*, § 195, n.



the mortgagee to purchase, or the statutes of a State upon that subject may authorize such purchase.<sup>1</sup> (a)

§ 602 w. This distinction must be carried along. If a trustee or mortgagee with a power of sale should execute a deed under the trust or power directly to himself, the deed would be simply void, and would pass nothing or make no change in the situations and relations of the parties, on the ground that no man can contract with himself, or make a deed to himself, or from himself in one capacity to himself in another;<sup>2</sup> but if a mortgagee or trustee execute deeds to third persons, and take back the title to themselves, such deeds are not void, but voidable only; and the *cestui que trust* or mortgagor can avoid them, or compel the purchaser to keep the property and pay the money.<sup>3</sup> And such deeds are voidable by the *cestuis que trust* alone: third persons cannot interfere.<sup>4</sup> It follows that, if the *cestuis que trust* are *sui juris*, they must elect to avoid the deed within a reasonable time after the facts come to their knowledge.<sup>5</sup> The deed being voidable only, an innocent purchaser from the trustee, for value and without notice, will take an indefeasible title.<sup>6</sup>

§ 602 x. Sales under powers in deeds of trust or mortgage are a harsh mode of foreclosing the rights of the mortgagor.

Walker v. Brungard, 13 Sm. & M. 723; Lucas v. Oliver, 34 Ala. 626; Richards v. Holmes, 18 How. 143.

<sup>1</sup> Ramsey v. Merriam, 6 Minn. 168; Griffin v. Marine Co., 52 Ill. 130; Elliott v. Wood, 53 Barb. 285.

<sup>2</sup> *Ante*, § 207, 1 Sugd. V. & P. 97 (8th Am. ed.).

<sup>3</sup> *Ante*, § 198, and cases; Pitt v. Pitnay, 12 Ired. L. 69; Brothers v. Brothers, 7 Ired. Eq. 150; Parmenter v. Walker, 9 R. I. 225.

<sup>4</sup> Edmondson v. Walsh, 27 Ala. 578.

<sup>5</sup> Scott v. Freeland, 7 Sm. & M. 409; Smith v. Frost, 70 N. Y. 65.

<sup>6</sup> Robbins v. Bates, 4 Cush. 104; Cranston v. Craue, 97 Mass. 459; Montague v. Dawes, 12 Allen, 397.

(a) See *supra*, § 199, n. The but has the burden of proof to show mortgagee of a chattel may purchase at a sale under the mortgage, fair dealing. Wygal v. Bigelow, 42 Kansas, 477.

They are scrutinized by courts with great care, and will not be sustained unless conducted with all fairness, regularity, and scrupulous integrity.<sup>1</sup> Upon very slight proof of fraud or unfair conduct, or of any departure from the terms of the power, they will be set aside.<sup>2</sup> If proper notices of the sale are not given, or if the proceedings are in any way contrary to justice and equity, the sale will not be allowed to stand.<sup>3</sup> And so, as the trustee cannot delegate his power or duty, if the power is not executed by the proper person, or in good faith, or with due diligence, or if proper notices have not been given, or if the power has been extinguished, sales under it will be set aside.<sup>4</sup> Thus, if the mortgagee should deceive the debtor by a promise to extend the time of payment, and the debtor, relying on such promise, should go away temporarily, a sale made in his absence would be set aside.<sup>5</sup> So also of a sale made in violation of an agreement to extend the time.<sup>6</sup> So a sale will be set aside if the creditor is guilty of any fraud or collusion, or if he pursues a course calculated to prevent competition.<sup>7</sup> So the sale will be set aside if made after the full amount of the debt is paid<sup>8</sup> or tendered.<sup>9</sup> A sale ought not to be made when the debt is uncertain or in dispute; and, if made, it may be set aside.<sup>10</sup> But the expression of an erroneous opinion at the sale, upon any subject, by third persons, is not a ground for

<sup>1</sup> *Bloom v. Rensselaer*, 15 Ill. 507.

<sup>2</sup> *Longwith v. Butler*, 3 Gilm. 32, 44; *Dana v. Farrington*, 4 Minn. 433; *Spencer v. Anon.*, id. 542.

<sup>3</sup> *Bronson v. Kinsie*, 1 How. 321; *Singleton v. Scott*, 10 Iowa, 408; *King v. Duntz*, 11 Barb. 191.

<sup>4</sup> *Rowan v. Lamb*, 4 G. Greene, 468; *Johnson v. Eason*, 3 Ired. 330; *Jenks v. Alexander*, 11 Paige, 619.

<sup>5</sup> *Schoonhoven v. Pratt*, 25 Ill. 457.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Longwith v. Butler*, 3 Gilman, 32.

<sup>8</sup> *Wade v. Harper*, 3 Yerg. 383; *Cameron v. Irwin*, 5 Hill, 272; *Ledyard v. Chapin*, 6 Port. (Ind.) 320; *Sherman v. —*, 3 Port. (Ind.) 320. See *Montague v. Dawes*, 12 Allen, 397; *Cranston v. Crane*, 97 Mass. 369.

<sup>9</sup> *Burnett v. Denniston*, 5 Johns. Ch. 35.

<sup>10</sup> *Gibson v. Jones*, 5 Leigh, 370; *Lane v. Tidhall*, 1 Gilm. 230.

setting the sale aside;<sup>1</sup> nor will an innocent purchaser be affected by private agreements to extend the time of payment not recorded and not notified to him.<sup>2</sup>

§ 602 y. The directions of the power must be complied with in selling the property as a whole or in lots or parcels. If a sale in either mode is excluded, the sale must not be made in that mode. If nothing is said about the manner of selling, whether by parcels or not, the donee of the power must exercise a sound and wise discretion for the purpose of procuring the largest price for the property, and if he exercises such discretion with due diligence and without fraud or collusion or for improper purposes, the sale will be good whether he sell in parcels or the whole.<sup>3</sup> A sale may be made in parcels, although the property is advertised as a whole, if a proper exercise of the trustee's discretion points out such mode.<sup>4</sup> It has been said that if the purchaser is ignorant of any abuse in the exercise of the discretion of the trustee he will take a good title, although the trustee abused his power; but this may be doubted.<sup>5</sup> If the value of the property is greatly above the amount of the mortgage, and the creditor sells in lots, he cannot sell after he has sold enough to satisfy his debts, and the court may decree a sale by lots or of part of the estate.<sup>6</sup>

§ 602 z. The sale will not be set aside for mere inadequacy of price, if due diligence was used by the donee of the power to sell under every possible advantage.<sup>7</sup> But there may be cases where the price is so grossly inadequate that the mere statement of it demonstrates that there must have

<sup>1</sup> *Bloom v. Rensselaer*, 15 Ill. 503.

<sup>2</sup> *Beattie v. Butler*, 21 Mo. 313.

<sup>3</sup> *Post*, § 774, and cases cited. *Quarles v. Lacy*, 4 Munf. 25; *Singleton v. Scott*, 11 Iowa, 589; *Turner v. Johnson*, 10 Ohio, 204; 7 *id.* 216; *Lamerson v. Morvin*, 8 Barb. 9.

<sup>4</sup> *Gray v. Howard*, 14 Mo. 341.

<sup>5</sup> *Singleton v. Scott*, 11 Iowa, 597.

<sup>6</sup> *Johnson v. Williams*, 4 Minn. 260.

<sup>7</sup> See *ante*, § 187; *Singleton v. Scott*, 11 Iowa, 589.

been some mismanagement or collusion, as if land worth \$500 should be sold for \$50.<sup>1</sup> In such case, if the bidders are few, and the sum offered low, the trustee should exercise his discretion to adjourn the sale, and not to do so might be fraud, which would demand that the sale should be avoided.<sup>2</sup> If, however, the price is rendered inadequate by any action of the *cestui que trust*, as by his forbidding the sale, or by any other conduct, the sale will be good if the trustee acted in good faith.<sup>3</sup>

§ 602 *aa.* In a conveyance to a trustee or mortgagee, the title as between the grantor or mortgagor and the trustee passes to the trustee or mortgagee. A trustee who has the fee in himself may convey it even if the conveyance is a breach of the trust, and his grantee takes a title upon which he can maintain actions at law. And so it is said that, although a trustee may convey the legal title in breach of the trust, and without complying with the power, yet the grantee will take a title good at law.<sup>4</sup> But such a purchaser in equity will still hold the property upon the same trusts

<sup>1</sup> See *ante*, § 187; *Wright v. Wilson*, 2 Yerg. 294.

<sup>2</sup> *Ante*, § 602, n.; *Runkle v. Gaylord*, 1 Nev. 123; *Encking v. Simmonds*, 28 Wis. 272; *Horsev v. Hough*, 38 Md. 130; *Marfield v. Ross*, *id.* 85.

<sup>3</sup> *Jones v. Neale*, 2 Pat. & H. (Va.) 339; *Forde v. Herron*, 4 Munf. 316.

<sup>4</sup> *Ante*, §§ 321, 328, 334; *Reece v. Allen*, 5 Gilm. 236; *Taylor v. King*, 6 Munf. 356; *Harris v. Harris*, *id.* 367; *Carrington v. Goddin*, 13 Grat. 600; *Gibson v. Jones*, 5 Leigh, 370; *Christian v. Yancey*, 2 Pat. & H. 240; *Skepworth v. Cunningham*, 8 Leigh, 271; 10 Leigh, 183; *Stimpson v. Fries*, 2 Jones, Eq. 136; *Newman v. Jackson*, 12 Wheat. 270; *Rowan v. Lamb*, 4 G. Greene, 468; *Conoy v. Troutman*, 7 Ired. L. 418; *Singleton v. Scott*, 11 Iowa, 589; *Gale v. Mensing*, 20 Mo. 461; *Bank v. Benning*, 4 Cranch, C. C. 81; *Jackson v. Clark*, 7 Johns. 217; *Miller v. Hull*, 4 Denio, 104; *King v. Buntz*, 11 Barb. 192; *Sherwood v. Reed*, 7 Hill, 431; *Dana v. Davenport*, 4 Munf. 433; *Huntley v. Buckner*, 6 Sm. & M. 7; *Brown v. Barte*, 10 Sm. & M. 268. This rule is founded upon a general principle, and prevails in all the States; see *ante*, § 334; except in New York, which converts the title of a trustee into a power by forbidding and making void all sales in breach of the trust.

upon which the trustee held it, for the reason that the purchaser will be held to know the record title of his vendor. He will have notice of the trust and of the power, and must be treated in equity as a trustee.<sup>1</sup> The law regards only the legal title; if that passes, it will prevail at law; but if a trustee has not the legal title but only a naked power over it, the legal title does not pass unless the power is strictly executed according to its terms. A trustee cannot bind the trust fund in his hands by entering into covenants in respect to it, and he is not authorized so to do. Therefore courts will not compel him to covenant except against his own acts. If, however, he enters into covenants, he will only bind himself personally. It is his duty, however, to make a good title, and if in his proposal for sale he states that the title is good, or that there is to be a good title, he cannot compel the purchaser to complete the sale if it is otherwise.<sup>2</sup> If the trustee once executes the power by a sale and deed, his power is extinguished, and he cannot afterwards give a new deed or make any recitals or admissions binding upon the parties.<sup>3</sup>

§ 602 *bb*. The execution of the power of sale in a deed of trust or mortgage conveys the title to the mortgaged land to the purchaser, and deprives the mortgagee of all interest in the premises,<sup>4</sup> and it bars the rights of all persons claiming under the mortgagor by conveyances made subsequent to the creation of the power or in other ways.<sup>5</sup> The purchaser's

<sup>1</sup> *Norman v. Hill*, 2 Pat. & H. 676; *Rowan v. Lamb*, 4 G. Greene, 468; *Singleton v. Scott*, 11 Iowa, 589, *Newman v. Jackson*, 12 Wheat. 570; *Waldron v. Chastney*, 2 Blatchf. 62; *Bayard v. Colefax*, 4 Wash. C. C. 38. In equity a purchaser of a trustee under a power must show that the sale was regular, that due notices were given, and he must prove all the facts that make a good title. *Gibson v. Jones*, 5 Leigh, 370; *Norman v. Hill*, 2 Pat. & H. 676.

<sup>2</sup> *Post*, §§ 784, 787; *Ennis v. Leach*, 1 Ired. Eq. 416.

<sup>3</sup> *Doe v. Robinson*, 24 Miss. 688.

<sup>4</sup> *Clay v. Sharp*, Sugd. V. & P. Appendix No. 14; *Corder v. Morgan*, 18 Ves. 344; *Sims v. Huntley*, 2 How. (Miss.) 896; *Tuthill v. Tracy*, 31 N. Y. 157.

<sup>5</sup> *Corder v. Morgan*, 18 Ves. 344; *Eaton v. Whiting*, 3 Pick. 484;

title, if the power has been properly and regularly executed, is absolute and irredeemable, and the sale bars infants, heirs, and married women of their dower.<sup>1</sup> The purpose of the power is to extinguish the equity of redemption of the mortgagor;<sup>2</sup> and, after its regular execution, his only right is to the surplus that may remain after the liquidation of the debt for which the property was sold. If he remains in possession of the premises, he is a mere tenant at sufferance,<sup>3</sup> and the purchaser is entitled to the crops growing upon the land at the time of the sale.<sup>4</sup> The statutes of the States that provide for redemption upon sales by license of courts, or upon executions, have no application to sales under powers.<sup>5</sup> But if there are statutes in any State broad enough to give a right of redemption for a certain time after a sale under a power, the sale confers an inchoate title upon the purchaser, subject to be defeated if redeemed within the time, and to become absolute, if not redeemed, and it then relates back to the time of purchase. When the title becomes thus perfected, the purchaser may maintain an action for injury to the premises by the mortgagor or others after the purchase, and before the title becomes irredeemable.<sup>6</sup> A sale under such prior power cuts off all subsequent mortgages, attachments, judgments, and liens,<sup>7</sup> even although the sale should be made to the mortgagor.<sup>8</sup> But a sale under a junior power

*Turner v. Johnson*, 10 Ohio, 204; *Brisbane v. Stoughton*, 17 id. 482; *Bloom v. Rensselaer*, 15 Ill. 506; *Bancroft v. Ashhurst*, 2 Grant, Cas. 513.

<sup>1</sup> *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Burnett v. Denniston*, 7 id. 45; *Johnson v. Turner*, 10 Ohio, 204; 7 Ohio, 216; *Brackett v. Baum*, 50 N. Y. 8.

<sup>2</sup> *Calkins v. Ishell*, 20 N. Y. 147.

<sup>3</sup> *Kinsley v. Ames*, 2 Met. 29; *Bank v. Guttschlick*, 14 Pet. 19.

<sup>4</sup> *Shepherd v. Philbrick*, 2 Denio, 174.

<sup>5</sup> *Bloom v. Rensselaer*, 15 Ill. 503.

<sup>6</sup> *Stone v. Keyes*, 2 Doug. 184; *Reil v. Baker*, 2 Denio, 79; *Smith v. Colvin*, 7 Barb. 157.

<sup>7</sup> *Wiswall v. Ross*, 4 Port. (Ala.) 321; *Brown v. Bartee*, 10 Sm. & M. 268; *Bodine v. Moore*, 18 N. Y. 347; *Pahlman v. Shumway*, 24 Ill. 127; *Collyer v. Collins*, 7 Iowa, 127.

<sup>8</sup> *Brown v. Bartee*, 10 Sm. & M. 268.

of sale mortgage conveys only the equity of redemption. It cuts off all liens, attachments, and judgments subsequent to the power under which it was made, but does not affect prior ones.<sup>1</sup> A sale under a power which does not pass the title may yet operate as an assignment of the mortgage debt or a part of it.<sup>2</sup> The same rules apply to the enforcement of sales and purchases under these powers as apply to other sales by trustees.<sup>3</sup> After a sale has been made under a power, a tender of the amount of the debt will not revest the title in the mortgagor even when there is a right to redeem, but recourse must be had to a court of equity.<sup>4</sup> It follows that the creditor, in making the sale, is absolutely accountable for the proceeds of the sale; if he gives any credit, or the money is lost in any way, he must still account for it.<sup>5</sup>

§ 602 *cc*. If a power of sale in a mortgage or deed of trust in the nature of a mortgage is not regularly executed, the right of redemption is not foreclosed or barred; but the mortgagor may still redeem the estate of the purchaser. Therefore, it is said that a bill in equity cannot be sustained to set aside such sale, but that the bill should be framed as for a bill to redeem. If the sale is relied upon as a bar to redemption, its regularity according to the power must be shown.<sup>6</sup>

§ 602 *dd*. The provisions in the power limiting and regulating the sale are for the benefit of the debtor. They are for his protection, and they may be waived by him, or his conduct may estop him from taking advantage of any irregularities, as if being present at the sale and knowing of the

<sup>1</sup> *Graham v. King*, 15 Ala. 568.

<sup>2</sup> *Gilbert v. Cooley*, Walk. Ch. 494; *Grosvenor v. Day*, 1 Clark, 109; *Jackson v. Bowen*, 7 Cow. 13.

<sup>3</sup> *Hem v. Rushowski*, 18 Mo. 216.

<sup>4</sup> *Smith v. Anders*, 21 Ala. 728.

<sup>5</sup> *Bailey v. Ætna Ins. Co.*, 10 Allen, 286.

<sup>6</sup> *Goldsmith v. Osborne*, 1 Edw. Ch. 560; *Schwarz v. Sears*, Walk. Ch. 170. This may be the rule to avoid circuity of action. The opposite doctrine was held in *Driver v. Fortner*, 5 Port. (Ala.) 9.

irregularity he should make no objection, but permit the sale to proceed, or if he should procure some one to purchase the property under such circumstances. Any conduct of the debtor that would render it inequitable for him to take advantage of such defects would debar him from setting them up.<sup>1</sup> And so, if the debtor has acquiesced in the sale for a long time, and has seen the property resold to innocent purchasers, or has seen valuable improvements made upon the land, or has in any way been guilty of negligence or laches in claiming his rights, equity will not interfere in his favor.<sup>2</sup> Nor will equity interfere at the suggestion of strangers who show no interest in the property,<sup>3</sup> nor when the sale is in accordance with the agreement of all the parties in interest, entered into for the protection of all their interests.<sup>4</sup>

§ 602 *ee.* It may be stated as a general proposition, that where the proceedings are so irregular that a sale would be nugatory or void, equity would enjoin it, if application was made.<sup>5</sup> If the trustee or creditor acts in bad faith, or exceeds his power, or proceeds in an irregular or oppressive manner, equity will enjoin the sale. This must be the rule, for the reason that if a debtor knows of the irregularity or of the fraud, and stands by and allows the proceedings to go on, he may be estopped from afterwards taking advantage of it.<sup>6</sup> If there is a dispute or doubt concerning the title, which

<sup>1</sup> *Lamb v. Goodwin*, 10 Ired. Eq. 320; *Chowning v. Cox*, 1 Rand. 306; 3 Leigh, 654; *Beebe v. De Baum*, 3 Eng. 510; *Hall v. Harris*, 1 Tex. 300; *Gift v. Anderson*, 5 Humph. 577; *Echols v. Dimik*, 2 Stew. 144; *Greenleaf v. Queen*, 1 Pet. 138; *Foster v. Gover*, 5 Ala. 428.

<sup>2</sup> *Chowning v. Cox*, 3 Leigh, 654; *Cresop v. McLean*, 5 Leigh, 391; *Caldwell v. Chapline*, 11 Leigh, 342.

<sup>3</sup> *Hannah v. Carrington*, 18 Ark. 85; *Foster v. Gover*, 5 Ala. 428; *Bayard v. Colefax*, 4 Wash. C. C. 38; *Drake v. Moore*, 18 Ala. 597; *Franklin v. Greene*, 2 Allen, 519.

<sup>4</sup> *Pollock v. Keasley*, 24 N. J. Eq. 94.

<sup>5</sup> *York, &c. Railw. Co. v. Myers*, 4 Maine, 109; *Van Berghen v. Demarest*, 4 Johns. Ch. 37, 38; *Platt v. McClure*, 3 Wood. & Minot, 151; *Matthie v. Edwards*, 2 Coll. 465.

<sup>6</sup> *Doolittle v. Lewis*, 7 Johns. Ch. 45, 50; *Johnson v. William*, 4 Minn. 260; *Johnson v. Henry*, 10 Johns. 185, 186.



would injure the sale of the property and greatly reduce the price of it, it is the duty of the trustee to clear up the title before the sale, and equity will enjoin the sale until it is done, and if there is doubt or dispute as to how much is due, or if the debt is unliquidated, a sale will be enjoined. The amount of the debts must be certain;<sup>1</sup> and if it is not so, the creditor must file a bill to ascertain the amount, and pray for leave to sell to pay the amount found due. And it is said that equity will enjoin a sale when new and further litigation would be prevented.<sup>2</sup> So when the whole debt is disputed, as for usury, or for any other defence to the claim made in good faith.<sup>3</sup> If, however, any amount is admitted to be due, or appears to the court to be due, that sum must be brought into court or tendered to the creditor before an injunction would be granted.<sup>4</sup> Nor would the court grant an injunction in order that different debtors might settle their individual rights among themselves; the sale must be made, and they can settle their own relations among themselves.<sup>5</sup> And equity will not interfere to give the mortgagor a further time to pay the debt.<sup>6</sup>

§ 602*ff*. The trust of the creditor under his deed or mortgage, if not otherwise expressed in the deed, is to sell the property, and after deducting the amount of his debt and the expenses of the sale, to pay the balance, if any, to the debtor,

<sup>1</sup> *Peck v. Peck*, 9 Yerg. 301; *Cole v. Savage*, Clark (N. Y.), 361; *Johnson v. Eason*, 3 Ired. Eq. 330; *Wilkins v. Gordon*, 10 Leigh, 547; *Ord v. Noel*, 5 Madd. 440; *Lane v. Tidball*, 1 Gil. (Va.) 130; *Gibson v. Jones*, 5 Leigh, 370; *Bassett v. Fisher*, 11 Grat. 499; *Hunt v. Bass*, 2 Dev. Eq. 292; *James v. Gibbs*, 1 Pat. & H. 277; *Miller v. Argyle*, 5 Leigh, 460; *Fisher v. Bassett*, 9 Leigh, 119; *Guy v. Hancock*, 1 Rand. 72; *Sandford v. Flint*, 24 Mich. 26.

<sup>2</sup> *Echloff v. Baldwin*, 16 Ves. 267; *Curtis v. Buckingham*, 3 Ves. & B. 168.

<sup>3</sup> *Marks v. Morris*, 3 Munf. 407.

<sup>4</sup> *Sloan v. Coolhaugh*, 10 Iowa, 30; *Stringham v. Brown*, 7 id. 33; *Casady v. Bosler*, 11 id. 242.

<sup>5</sup> *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; *Cooper v. Stevens*, 1 id. 425; *Gill v. Lyon*, id. 447.

<sup>6</sup> *Hyman v. Devereux*, 63 N. C. 624.

his heirs, executors, administrators, or assigns, and the surplus must be paid according to the terms of the trust.<sup>1</sup> If there are subsequent liens, mortgages, judgments, or assignments, the creditor must pay the surplus to the persons holding such liens or assignments, in the order in which they attach to the property.<sup>2</sup> No subsequent lien or assignment can displace a previous lien, and although a debtor can assign any surplus that may be coming to him, yet such assignment cannot defeat a prior lien on the property.<sup>3</sup> To entitle a judgment creditor to follow or claim the surplus, he must have made his judgment a lien on the property or upon the equity of redemption. If there are no liens or assignments of the surplus by the debtor, creditors can reach the surplus in the mortgagor's hands by attachment,<sup>4</sup> trustee process, or garnishment, or, in some cases, by a creditor's bill. If there are no subsequent claims upon the surplus, it goes to the debtor; if he is dead, it goes as real estate to his heirs, for a conversion under a deed of trust or mortgage with a power of sale extends to so much only as is necessary to pay the debt, and the widow is entitled to dower in the surplus, as in an equity of redemption, or she

<sup>1</sup> *Goulden v. Buckelew*, 4 Cal. 107; *Pierce v. Robinson*, 13 Cal. 116; *Russell v. Dufon*, 4 Lans. 399.

<sup>2</sup> *Bodine v. Moore*, 18 N. Y. 347; *Calkins v. Isvell*, 20 N. Y. 152; *Bartlett v. Gage*, 4 Paige, 503; *Averill v. Loucks*, 6 Barb. 470; *Eddy v. Smith*, 13 Wend. 488; *Waller v. Harris*, 7 Paige, 167; 20 Wend. 555; *White v. Watkins*, 23 Mo. 429; *Doniphan v. Paxton*, 19 Mo. 288; *Kennedy v. Hammond*, 16 Mo. 341; *Cook v. Dillon*, 9 Iowa, 407; *Chase v. Parker*, 14 id. 207; *Pahlman v. Shumway*, 24 Ill. 127; *Presnell v. Landers*, 5 Ired. Eq. 251; *Palmer v. Yarborough*, 1 id. 310; *Harrison v. Battle*, 1 Dev. Eq. 541; *Marlow v. Johnson*, 31 Miss. 128; *Russell v. Dufon*, 4 Lans. 399. A mortgagee who sells property subject to his mortgage and other liens becomes trustee for the benefit of all concerned, and if he acts in good faith and within the scope of his authority, the court will not hold him responsible for mere errors of judgment, however unfortunate, which he could not reasonably have anticipated. *Mackay v. Langley*, 92 U. S. 142.

<sup>3</sup> *Doniphan v. Paxton*, 19 Mo. 288; *Palmer v. Yarborough*, 1 Ired. 310.

<sup>4</sup> *Bailey v. Merritt*, 7 Minn. 159.

is entitled to dower in the whole estate if she has not released it by joining in the deed.<sup>1</sup> If the sale is made under a second deed of trust or mortgage, nothing is to be paid to the prior mortgagee, as such sale does not affect such prior lien, but it cuts off all subsequent mortgages, liens, judgments, or assignments; therefore they are to be paid as before stated.<sup>2</sup> Whether the trustee is to search for such subsequent liens upon the property, or whether he can dispose of the surplus in the absence of notice of subsequent liens with safety to himself, is not entirely settled; but it would appear that a mortgagee is not compelled to search the record for liens subsequent to the date of his own deed.<sup>3</sup>

§ 602 *gg*. These powers of sale in mortgage-deeds do not change their character as mortgages, but the powers of sale are superadded to mortgages. It is a cumulative power of foreclosure; and if the mortgagee does not choose to exercise the power, he may foreclose the mortgage by any of the other methods provided by law,<sup>4</sup> and the power need not be coextensive with the mortgage or its conditions;<sup>5</sup> and so, if the mortgagee has once entered to foreclose, he may afterwards exercise the power of sale.<sup>6</sup>

<sup>1</sup> *Wright v. Rose*, 2 S. & S. 323; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Tabele v. Tabele*, id. 45; *Hinchman v. Stiles*, 1 Stockt. 454. But see *Pahlman v. Shumway*, 24 Ill. 127; and see *Varnum v. Meserve*, 8 Allen, 158, where the mortgagor had died, leaving a will.

<sup>2</sup> *Helmey v. Heitcamp*, 20 Mo. 569; *Graham v. King*, 15 Ala. 563.

<sup>3</sup> *Cook v. Dillon*, 9 Iowa, 407.

<sup>4</sup> *Cormerais v. Genella*, 22 Cal. 116; *Thompson v. Houze*, 48 Miss. 445; *Merriott v. Givens*, 8 Ala. 694; *Morrison v. Bean*, 15 Tex. 257.

<sup>5</sup> *Butler v. Ladue*, 12 Mich. 173; *Montgomery v. McEwen*, 9 Minn. 103.

<sup>6</sup> *Montague v. Dawes*, 12 Allen, 397.

## CHAPTER XXI.

## TRUSTEES FOR INFANTS.

- § 603. The special care of courts of equity over infants.
- § 604. Investments for infants.
- §§ 605, 606. Power to convert an infant's personal property into real estate.
- § 607. Conversion in cases of necessity.
- § 608. Leases of infants' lands.
- Conversion of infants' estate.
- § 609. Power to convert real estate into personal property.
- § 610. Powers of courts of equity to decree a conversion of an infant's property.
- § 611. The rights of an infant will remain the same whether his property is converted or not.
- Maintenance, see also § 623.
- § 612. Duty of a father to maintain his infant children,—duty of trustees as to maintenance.
- § 613. Power of the court to order maintenance.
- § 614. Will direct an inquiry as to the ability of the father and the rank and circumstances of the family.
- § 615. In what manner infants are to be maintained.
- § 616. When maintenance will not be decreed.
- § 617. Proceedings to obtain decrees of maintenance.
- § 618. Trustees must not expend the principal of an infant's estate without the sanction of the court.
- § 619. Whether the court can authorize the expenditure of part of the principal of an infant's property.
- § 620. Where the settlement or will contains directions as to maintenance.
- § 621. An infant *cestui que trust* has the same rights and remedies as other *cestuis que trust*.
- § 622. Trustees for infants must account. When.
- § 623. Infants may be maintained out of the jurisdiction of the court.
- § 624. To whom a trustee may pay money for an infant.

§ 603. INFANTS and their property are, in an especial manner, under the protection of courts of equity. The court has an inherent jurisdiction, which extends to the care of the persons of infants, so far as it is necessary for their protection and education, (a) and also of their property, real

(a) As to the children's education, children shall be brought up, even after his death, or when they are terminated the religion in which his wards of court. *In re Agar-Ellis*,

and personal, and its due management, preservation, and proper application to their maintenance.<sup>1</sup> The court is their general guardian, and upon the institution of proceedings therein, involving their personal or pecuniary rights, they are regarded as wards of the court, and under its special cognizance and protection, and no act can be done affecting either their persons, property, or condition, except under the express or implied direction of the court itself; (a) and everything done without such direction is treated as a violation of the authority of the court, and the offending party is deemed guilty of a contempt, and treated accordingly.<sup>2</sup>

<sup>1</sup> *Hope v. Hope*, 4 De Gr., M. & G. 328; *Dawson v. Jay*, 3 id. 764; *Stuart v. Bute*, 9 H. L. Cas. 440; *Johnson v. Beattie*, 10 Cl. & Fin. 440; *Nugent v. Vetsera*, L. R. 2 Eq. 701; *Spring v. Woodworth*, 4 Allen, 326; *Anderson v. Mather*, 44 N. Y. 229.

<sup>2</sup> *Per Nelson, J.*, *Williamson v. Berry*, 8 How. 555; 2 Story, Eq. Jur. §§ 1341, 1352, 1353; *Smith v. Smith*, 3 Atk. 304; *Eyre v. Shaftesbury*, 2 P. Wms. 103; *Gilb.* 172; 2 Eq. Cas. Ab. 710, pl. 3; 755, pl. 4; 3 Lead.

24 Ch. D. 317; *In re Scanlan*, 40 Ch. D. 200; *In re McGrath*, [1892] 2 Ch. 496; 67 L. T. 636; *In re Walsh*, 13 L. R. Ir. 269. The rule is probably more restricted in America. See *Brown's Estate*, 166 Penn. St. 249. Where infants were interested in real estate in England, whose father was dead, and who lived with their mother out of the jurisdiction, she being one of three testamentary guardians, an order was made, at the instance of the other guardians, declaring in what faith the infants should be educated. *In re Montagu*, 28 Ch. D. 82. After the father's death the court will follow his wishes as to the religion the child is to be brought up in, and in the absence of evidence to the contrary his own professed faith will be the guide. If the father was indifferent, the welfare of the child will be paramount to the faith nominally

professed by the father. *In re McGrath*, [1893] 1 Ch. 143; see *In re Magees*, 31 L. R. Ir. 513; *In re Newbery*, L. R. 1 Ch. 263; L. R. 1 Eq. 431; *Hawkesworth v. Hawkesworth*, L. R. 6 Ch. 539; *Andrews v. Salt*, L. R. 8 Ch. 622; *In re Nevin*, [1891] 2 Ch. 299; *In re X.*, [1899] 1 Ch. 526; *In re Newton*, [1896] 1 Ch. 740. In *Skinner v. Orde*, L. R. 4 P. C. 60, where, after the death of the father, who was a British subject and a Christian, the mother, after cohabiting with a married man, became his Mahometan wife, the court appointed a Christian guardian.

As to custody, the English courts can now deprive a father thereof, under the Guardianship of Infants Act, 1886, in cases where his rights would not have been forfeited at common law. *In re A. & B.*, [1897] 1 Ch. 786.

(a) See *supra*, § 52, n.

§ 604. In England, it is a settled rule of the court that money in trust for an infant must be laid out in three per cent consols; and the court will not even refer it to a master to inquire whether it would be for the benefit of the infant that the trustee should invest the sum in real or any other security, unless there is something very special in the case to induce the court to relax the rule.<sup>1</sup> In the United States, there is no such general rule, and there are no statutes directing how trustees shall invest the trust funds; but in some States there are statutes directing how savings-banks shall invest money deposited with them, and courts have sometimes directed trustees to invest the trust funds in those securities that have been legalized for savings-banks.

§ 605. In England, trustees or guardians are not ordinarily permitted to change the nature of the infant's property by converting personalty into realty, or *vice versa*; <sup>2</sup> as, where the trustees of an infant had saved £2,000 out of the profits of real estate, and laid it out in lands adjoining the infant's estate, with the consent of the guardian, and the infant died under age, the trustees were held not justified in making such an investment, and were ordered to account to the infant's executors.<sup>3</sup> The rule originated in the fact that formerly an infant at seventeen might make a will of personalty, and to convert his personalty into real estate took away a power that the law gave him; on the other hand, to convert his real estate into personalty gave him a power contrary to the policy of the law.<sup>4</sup> (a) This reason ceased with the

Cas. Eq. 538-600; *Aymar v. Roff*, 3 Johns. Ch. 49; In *Matter of Whitaker*, 4 Johns. Ch. 378; *Garr v. Drake*, 2 Johns. Ch. 542; *Van Duzer v. Van Duzer*, 6 Paige, 366; *De Manneville v. De Manneville*, 10 Ves. 52.

<sup>1</sup> *Norbury v. Norbury*, 4 Mod. 191.

<sup>2</sup> 1 Madd. Ch. Pr. 269; 2 Story, Eq. Jur. § 1357; *Ex parte Phillips*, 19 Ves. 122; *Witter v. Witter*, 3 P. Wms. 101; *Rook v. Worth*, 1 Ves. 461; *Tullett v. Tullett*, Amb. 370.

<sup>3</sup> *Winchelsea v. Norcliffe*, 1 Vern. 341; *Gibson v. Scudmore*, 1 Dick. 45.

<sup>4</sup> *Ware v. Polhill*, 11 Ves. 278; *Ex parte Phillips*, 19 Ves. 122; *Ash-*

(a) See *Att. Gen. v. Ailesbury*, 12 A.C. 672, 682, 694; 16 Q. B. D. 439.

statute of wills, which takes away the right of infants to make wills, either of real or personal estate, before they are twenty-one. Lord Eldon seemed to think that the rule was established for the protection of the relative interests of the real and personal representatives of the infant;<sup>1</sup> but it is now established that the court will not regard the interests of an infant's representatives, nor interfere to protect them, but will look only to the best interest of the infant.<sup>2</sup> There seems now to be no principle at the bottom of the rule; and therefore it has been said in some cases, that where the advantage or convenience of the infants called for a change in the nature of the property, the court would order it.<sup>3</sup> In other and later cases, the jurisdiction and power of the court to change the nature of an infant's property have been denied; and it seems now to be the established rule, that such change cannot be made even for the advantage of the infant.<sup>4</sup>

§ 606. In the United States, a guardian or trustee cannot convert an infant's personalty into real estate.<sup>5</sup> If such conversion is made, the wards, on coming of age, may elect to receive their personal property, and the trustee or guar-

*burton v. Ashburton*, 6 Ves. 6; *Sergeson v. Sealey*, 2 Atk. 413; *Rook v. Worth*, 1 Ves. 461; *Witter v. Witter*, 3 P. Wms. 99; *Inwood v. Twyne*, 2 Eden, 152; *Ex parte Bromfield*, 1 Ves. Jr. 461; *Pierson v. Shore*, 1 Atk. 480; *Ex parte Grimstone*, Amb. 708.

<sup>1</sup> *Ware v. Polhill*, 11 Ves. 278.

<sup>2</sup> *Pierson v. Shore*, 1 Atk. 480; *Oxenden v. Compton*, 2 Ves. Jr. 69; 4 Bro. Ch. 201; *Ex parte Grimstone*, Amb. 706; 4 Bro. Ch. 235, n.; In *Matter of Salisbury*, 3 Johns. Ch. 347; *Lloyd v. Hart*, 2 Penn. St. 477.

<sup>3</sup> *Inwood v. Twine*, Amb. 419; 2 Eden, 147; *Terry v. Terry*, Ch. Pr. 273.

<sup>4</sup> *Taylor v. Phillips*, 2 Ves. 23; *Simpson v. Jones*, 2 R. & M. 365; *Calvert v. Godfrey*, 6 Beav. 97; *Peto v. Gardner*, 12 L. J. (N. S.) Ch. 371; 2 Y. & C. Ch. 312; *Garmstone v. Gaunt*, 1 Col. C. C. 577; *Anderson v. Mather*, 44 N. Y. 249.

<sup>5</sup> *Eckford v. De Kay*, 8 Paige, 89; *Rogers v. Paterson*, 4 Paige, 109; *Ex parte Crutchfield*, 3 Yerg. 335; *Moore v. Moore*, 12 B. Mon. 190; *Bonsall's App.*, 1 Rawle, 273; *Wolf v. Eichelberger*, 2 Penn. St. 346; *Royer's App.*, 11 id. 86.

dian must account and pay it over to them;<sup>1</sup> or they may acquiesce in the purchase after becoming of age, and if they so acquiesce for a long time, they cannot afterwards claim the money, although the original conversion into real estate was wrongful.<sup>2</sup> So to use any part of the ward's personal property in making permanent improvements upon his real estate, is a conversion of personalty into real estate, and is unauthorized, and will not be allowed to the trustee or guardian.<sup>3</sup> Where a guardian used his own money in constructing buildings upon the ward's land, it was held that he could not recover the money back from the infant.<sup>4</sup> But where the enlargement of a tenement upon the ward's land greatly increased the rents, the trustee was allowed a credit for the expenditure.<sup>5</sup> In one case, it was referred to a master to report whether it was for the interest of the infant to spend money in repairs upon real estate of which he was tenant in tail in expectancy;<sup>6</sup> and in another case it was said that an allowance for permanent improvements may be made where it is obviously for the ward's interest.<sup>7</sup> But a trustee or guardian should not venture to expend the ward's personalty in that manner without first obtaining the sanction of the court; for if an unauthorized act is first done, the court will not sanction it, though in the particular case it might be proper if first sanctioned by the court; for the principle is that trustees and guardians of infants should take no important step without leave of the court, and the court will punish such action taken on their own responsibility, by refusing to sanction the expenditures.<sup>8</sup>

<sup>1</sup> *Eckford v. De Kay*, 8 Paige, 89; *Rogers v. Paterson*, 4 Paige, 109.

<sup>2</sup> *Moore v. Moore*, 12 B. Mon. 190.

<sup>3</sup> *Hassard v. Rowe*, 11 Barb. 22; *Bellinger v. Shafer*, 2 Sandf. Ch. 297; *Alexander v. Alexander*, 8 Ala. 796; *Copely v. O'Neil*, 39 How. (N. Y.) 41.

<sup>4</sup> *Hassard v. Rowe*, 11 Barb. 22.

<sup>5</sup> *Miller's Estate*, 1 Penn. St. 326.

<sup>6</sup> *Hood v. Bridport*, 11 Eng. L. & Eq. 271.

<sup>7</sup> *Jackson v. Jackson*, 1 Grat. 143.

<sup>8</sup> *Worth v. Curtis*, 3 Shep. 228; *Miller's Estate*, 1 Penn. St. 326; *Mason v. Wait*, 4 Scam. 127.



§ 607. It is said that, in case of necessity, the guardian or trustee may purchase land with the personalty of an infant.<sup>1</sup> No rules can be laid down to govern the conduct of the guardian or trustee as to such necessity, and the safest course is to apply to the court having jurisdiction of the ward's estate. (a) In a proceeding to divide an estate, in which the infant owned a third, it was held that a guardian might purchase the interest of other heirs to prevent a sacrifice of the estate and the ward's property.<sup>2</sup> A guardian may relieve his ward's real estate from an elegit, extent, mortgage, or lien, which, if left unredeemed, would probably destroy the ward's interest.<sup>3</sup> If a guardian purchases real estate for his ward, he cannot convey it again without the leave and sanction of the court; as where a guardian purchased real estate in trust for his wards, and upon their marriage he conveyed it to their husbands, the fee was held to be still in the wards.<sup>4</sup>

<sup>1</sup> *Bonsall's App.*, 1 Rawle, 273; *Royer's App.*, 11 Penn. St. 36; *Billington's App.*, 3 Rawle, 55.

<sup>2</sup> *Bowman's App.*, 3 Watts, 369. This was held not to be a conversion of personalty into real estate, but simply the expenditure of such money as was necessary to preserve the estate.

<sup>3</sup> *Ronald v. Buckley*, 1 Brock. 356.

<sup>4</sup> *Kauffman v. Crawford*, 9 Watts & S. 131; *Robinson v. Robinson*, 22 Iowa, 427.

(a) The guardian cannot bind the ward's estate by a contract for the latter's support or necessities, or by admissions; he is primarily liable upon his express contracts. *Denholm v. McKay*, 148 Mass. 434. A guardian can grant a right of way over the ward's land without the probate court's license. *State v. Hamilton County Com'rs*, 39 Ohio St. 58. He can confirm the ward's conveyance of land only by such a license and by himself executing a conveyance. *Doty v. Hubbard*, 55 Vt. 278. The guardian's mental unsoundness does not invalidate his conveyance of the ward's land under the court's order. *Greer's Appeal*, 101 Penn. St. 412.

*Rollins v. Marsh*, 128 Mass. 116; *Massachusetts Hospital v. Fairbanks*, 132 Mass. 414; *Tyler v. Odd Fellows' Ass'n*, 145 Mass. 134; *Turner v. Flagg* (Ind.), 33 N. E. Rep. 1004; *Hunt v. Maldonado*, 89 Cal. 636; *Kingsbury v. Powers*, 131 Ill. 182; *Reading v. Wilson*, 38 N. J. Eq. 446. A guardian's laches is not imputable to an infant ward.

§ 608. There can be no doubt that it is the duty of the trustees or guardians of infants to lease the lands of their wards, as the wards are incapable of acting for themselves; and they must collect the rents and account for them:<sup>1</sup> but they cannot execute leases extending beyond the majority of the infants; if they do, the infants, on coming of age, can disaffirm the lease and take the possession.<sup>2</sup>

§ 609. Reference thus far has been made only to the power of trustees or guardians to convert their ward's personalty into real estate, for the reason that under no circumstances can a trustee or guardian of an infant convert the ward's real estate into personalty by a sale, without the order, decree, or license of a court. If such sale is already made, and an application is made to have it sanctioned, the court will refuse.<sup>3</sup>

§ 610. Whether a court of general equity powers has an inherent jurisdiction, without some enabling statute, to decree a conversion of an infant's property, is a matter of doubt and much conflict of opinion. The jurisdiction to decree such conversion has been sustained in some cases,<sup>4</sup> and denied in others.<sup>5</sup> The reasoning of the cases where

<sup>1</sup> *Field v. Schieffelin*, 7 Johns. Ch. 150; *Byrne v. Van Hoesen*, 5 Johns. 66; *Ross v. Gill*, 4 Call, 250; *Genet v. Talmadge*, 1 Johns. Ch. 561; *Emerson v. Spicer*, 55 Barb. 418.

<sup>2</sup> *Ross v. Gill*, 4 Call, 250; *Emerson v. Spicer*, 55 Barb. 428.

<sup>3</sup> *Worth v. Curtis*, 3 Shep. 228; *Miller's Estate*, 1 Penn. St. 326; *Mason v. Wait*, 4 Scam. 127.

<sup>4</sup> *William's Case*, 3 Bland, 186; *Ex parte Jewett*, 16 Ala. 409; *Troy v. Troy*, 1 Busb. Eq. 87; *Williams v. Harrington*, 11 Mod. 616; *Huger v. Huger*, 3 Des. 18; *Stapleton v. Langstaff*, id. 22; *Matter of Salisbury*, 3 Johns. Ch. 347; *Wood v. Mather*, 38 Barb. 573.

<sup>5</sup> In *Baker v. Lorillard*, 4 Comst. 257, the court said that it had no jurisdiction to order a sale of an infant's real estate, except by the statute giving it that power. *Rogers v. Dill*, 6 Hill, 415, decided that a title taken under a decree of sale by a court of equity, contrary to the testator's will, was bad. *Forman v. Marsh*, 1 Kern. 547, was the exercise of the jurisdiction under the statute. *Nelson, J.*, denied the jurisdiction in *Williamson v. Berry*, 8 How. 531; 3 Lead. Cas. in Eq. 269 (3d Amer. ed.). In An-

the jurisdiction is denied is, that where statutes have been enacted, giving power to surrogates or probate courts to authorize the sale of lands belonging to infants and minors by their guardians, trustees, or other persons, such statutes are to be followed; that they give an exclusive jurisdiction, and prescribe all the rules of the sale, and enact what securities shall be taken for the protection of the ward; and that courts of equity can have no jurisdiction where such formal proceedings and such adequate remedies are given by statute. Nearly all the States have statutes giving guardians, or other persons appointed by the court, power to sell the real estate of infants, on applying in due form, and showing that it will be advantageous to the infant to convert his real estate into some other kind of property. (a) The authority or license given by the court to the guardian, trustee, or other person who may be appointed to sell and convey the estate, confers upon them the same power that is given to executors and administrators to sell the real estate of a deceased person for payment of debts.<sup>1</sup> Legislatures, in the absence of general statutes authorizing courts to act, may authorize the sale and conversion of an infant's real estate,

*derson v. Mather*, 44 N. Y. 249, it was held that chancery has an inherent power over an infant's lands held in trust, not derived from the statute; that the statute relates to lands owned in fee by the infant, and not to his equitable estates; and that the prohibitions of the statute are restrictions upon trustees, and not limitations upon the power of courts.

<sup>1</sup> *Field v. Schieffelin*, 7 Johns. Ch. 150; *Bank of Va. v. Clegg*, 6 Leigh, 399; *Garland v. Loring*, 6 Rand. 396; *Matter of Wilson*, 2 Paige, 412; *Pope v. Jackson*, 11 Pick. 113; *Talley v. Starke*, 6 Grat. 339; *Duckett v. Skinner*, 11 Ired. 431; *Brown's Case*, 8 Humph. 200; *Peyton v. Alcorn*, 7 J. J. Marsh. 500; *Dow's Pet.*, Walk. Ch. 145; *Young v. Keogh*, 11 Ill. 642; *Harding v. Larned*, 4 Allen, 426; *Dalrymple v. Taneyhill*, 4 Md. Ch. 171; *Joor v. Williams*, 9 George, 546; *Ex parte Jewett*, 16 Ala. 409; *Morris v. Morris*, 2 McCarter, 239; *Beal v. Harman*, 38 Mo. 435; *Wood v. Mather*, 38 Barb. 473.

(a) The power of a court of equity to fully administer a trust is not curtailed, so as to give the probate court jurisdiction *pro tanto*, by the fact that infants are parties interested in the sale, mortgage, or lease which it authorizes. *Miller v. Texas & Pac. Ry. Co.*, 132 U. S. 662; *Mayall v. Mayall*, 63 Minn. 511.

and such legislation in particular cases, or generally in enabling courts to grant authority, is constitutional.<sup>1</sup> In addition to these statutes, there are statutes in several of the States authorizing trustees to apply to the court, by petition or bill, for license to sell real estate held in trust, whether for infants or adults, although there may be interests that may devolve upon persons not yet in being. The statutes authorize the courts to appoint some one to appear for and represent minors and persons not in being; and if, upon the hearing of all parties interested, it appears to be for the interest of all that the real estate should be sold, a sale is decreed, and the trustees are ordered to invest the proceeds in safe securities upon the same trusts.<sup>2</sup> If, however, there is any particular privilege conferred upon an infant, of which he would be deprived by a sale of the estate, a sale will be denied; as where a testator gave his mansion-house and farm to a son for life, and his mansion-house and a portion of his farm to such one of his grandsons, by this or another son, in remainder, as should elect the mansion-house and land as his share. Upon a petition setting forth that it was for the interest of all parties that the estate should be sold, the court held that it was a specific devise to such grandson in remainder as should elect to take the mansion-house; that to decree a sale would defeat the intention of the testator; that if the mansion-house was going

<sup>1</sup> *Snowhill v. Snowhill*, 2 Green, Ch. 20; *Norris v. Clymer*, 2 Penn. St. 277; *Davis v. Johannot*, 7 Met. 388; *Spotswood v. Pendleton*, 4 Call, 514; *Dorsey v. Gilbert*, 11 G. & J. 87; *Powers v. Bergen*, 2 Seld. 358; *Nelson v. Lee*, 10 B. Mon. 495; *In Matter of Bull*, 45 Barb. 524. For other cases of sale and conversion of trust estates authorized by legislatures, see *Leggett v. Hunter*, 19 N. Y. 445; *Clark v. Van Surley*, 15 Wend. 436; *Cochran v. Van Surley*, 20 id. 365; *Bambaugh v. Bambaugh*, 14 Serg. & R. 191; *Blagge v. Miles*, 1 Story R. 426; *Matthew v. Holman*, 16 Pet. 25; *Wilkson v. Leland*, 2 Pet. 627; *Ward v. Screw Co.*, 1 Cliff. 565; *Florentine v. Barton*, 2 Wall. 210; *Thurston v. Thurston*, 6 R. I. 296; *Sohier v. Mass. General Hospital*, 3 Cush. 483; and *Ervin's App.*, 16 Penn. St. 256, where a sale made under an act of the legislature, but before the time prescribed in the instrument of trust, was held invalid.

<sup>2</sup> *Public Stat. Mass.* It has been said, however, that the court ought to retain the title to the land for security of the purchase-money.

to decay and the income was insufficient to repair it, so that the devise over would be substantially defeated, a sale might be ordered, but, no such case appearing, a sale was denied.<sup>1</sup> If, however, a power of conversion is given in the instrument of trust, the trustee may exercise all the powers of conversion given him.<sup>2</sup> In such cases, the trustee for an infant may exercise even larger powers than a trustee for a person *sui juris*; for such person's signature to receipts may be required,<sup>3</sup> but as an infant can do no valid act, a trustee for sale of his property takes by implication the power to sign receipts and receive the purchase-money.<sup>4</sup>

§ 611. If an infant's lands are sold by order of the court the proceeds remain real estate, so far as the guardian and infant are concerned, until he is of age;<sup>5</sup> but if he dies after coming of age the proceeds are treated as personalty.<sup>6</sup> Timber cut upon an infant's estate, and the proceeds and the accumulation of the proceeds, remain real estate, if the infant is tenant in fee;<sup>7</sup> but if he is tenant in tail, they are considered personalty, to prevent them from going to the remainder-man.<sup>8</sup> If an infant's personal property is used to pay off incumbrances on the estate, it is still looked upon

<sup>1</sup> Davis's Pet., 14 Allen, 24. In *Rogers v. Dill*, 6 Hill, 415, the court went further, and declared that a purchaser, under a decree of sale that ought not to have been made by the court, took no title. See *Matter of Heaton*, 21 N. J. Eq. 221.

<sup>2</sup> *Ashburton v. Ashburton*, 6 Ves. 6; *Terry v. Terry*, Pr. Ch. 273; *Rogers v. Dill*, 6 Hill, 415.

<sup>3</sup> 2 Sugd. V. & P. 45.

<sup>4</sup> *Lavender v. Stanton*, 2 Madd. 46; *Sowarsby v. Lacy*, 4 Madd. 142; *Breedon v. Breedon*, 1 R. & M. 413.

<sup>5</sup> *Genet v. Talmadge*, 1 Johns. Ch. 564; *Snowhill v. Snowhill*, 2 Green, Ch. 20; *Lloyd v. Hart*, 2 Pa. St. 473; *March v. Berrier*, 6 Ired. Eq. 524; *Shumway v. Cooper*, 16 Barb. 556; *Sweezy v. Thayer*, 1 Duer, 286; *Forman v. Marsh*, 1 Kern. 544; *Fidler v. Higgins*, 21 N. J. Eq. 138.

<sup>6</sup> *Snowhill v. Snowhill*, 2 Green, Ch. 20.

<sup>7</sup> *Tullet v. Tullet*, 1 Dick. 352; *Amb. 370*; *Mason v. Mason*, cited *Amb. 371*; *Ex parte Phillips*, 19 Ves. 124; *Rook v. Worth*, 1 Ves. 461; *Ex parte Bromfield*, 1 Bro. Ch. 516.

<sup>8</sup> *Ibid.*; *Dyer v. Dyer*, 34 Beav. 504.

as part of the personalty.<sup>1</sup> But necessary expenses for keeping up the estate, as ordinary repairs, are thrown upon the personalty;<sup>2</sup> and so where an estate was devised to an infant, in consideration of his paying off the original cost, such payment was held to be a necessary expense and to fall upon the personalty.<sup>3</sup> Generally, the proceeds of an estate, as timber, go with the estate;<sup>4</sup> but in a late case, an infant dying under age, the proceeds of timber cut during his life was held to be personalty.<sup>5</sup> These distinctions are quite immaterial in the United States, as in most of them, if not all, both real and personal estate descends to the same persons as heirs, and both real and personal estates are equally liable for debts.

§ 612. A father is bound to maintain his infant children, if he has sufficient ability; therefore a trustee cannot apply any part of the income of an infant's estate to its maintenance<sup>6</sup> without an order of court.<sup>7</sup> If the father has the means to maintain his children, the trustee cannot apply income to their support, although there is a provision for their maintenance in the instrument of trust.<sup>8</sup> (a) But if

<sup>1</sup> *Ibid.*; *Seys v. Price*, 9 Mod. 220; *Dowling v. Belton*, 1 Flan. & Kelly, 462; 2 Freem. 114, 126; *Ex parte Grimstone*, Amb. 708; *Palmer v. Danby*, Pr. Ch. 137; *Zoach v. Lloyd*, cited *Awdley v. Awdley*, 2 Vern. 192; *Dennis v. Badd*, — see *Winchelsea v. Norcliffe*, 1 Vern. 436; *Mason v. Dry*, Pr. Ch. 319; *Pierson v. Shore*, 1 Atk. 480.

<sup>2</sup> *Ex parte Grimstone*, cited *Oxenden v. Compton*, 4 Bro. Ch. 235, n.; Amb. 708.

<sup>3</sup> *Vernon v. Vernon*, cited *Ex parte Bromfield*, 1 Ves. Jr. 456.

<sup>4</sup> *Field v. Brown*, 27 Beav. 90.

<sup>5</sup> *Dyer v. Dyer*, 34 Beav. 504.

<sup>6</sup> *Fawkner v. Watts*, 1 Atk. 408; *Jackson v. Jackson*, id. 513; *Butler v. Butler*, 3 Ark. 60; *Darley v. Darley*, id. 399; *Stocken v. Stocken*, 4 Myl. & Cr. 98; *Cruger v. Heyward*, 2 Des. 94; *Matter of Kane*, 2 Barb. Ch. 375; *Bethea v. McColl*, 5 Ala. 312; *Sparhawk v. Buell*, 9 Vt. 41; *Walker v. Crowder*, 2 Ired. Eq. 478; *Chaplin v. Moore*, 7 Mon. 173; *Dupont v. Johnson*, 1 Bail. Eq. 279; *Myers v. Myers*, 2 McCord, Ch. 214.

<sup>7</sup> *McKnight v. Walsh*, 23 N. J. Eq. 136.

<sup>8</sup> *Mundy v. Howe*, 4 Bro. Ch. 224; *Hughes v. Hughes*, 1 id. 387;

(a) The duty of a parent to children is both a legal and a moral supply necessaries for his minor one. *Porter v. Powell*, 79 Iowa,

there is an agreement in a marriage settlement that the father shall have maintenance out of the trust property, the trustee must apply the income to the support of the children, without reference to the father's ability to support them.<sup>1</sup> If, however, the trustees have a discretionary power in that respect, the father cannot compel them to exercise it in his favor;<sup>2</sup> nor will the court interfere if they choose to exercise their discretion.<sup>3</sup> But where the income is expressly given to the father for the maintenance of his children, these rules do not apply; for such gift is in some sort a gift to the father.<sup>4</sup> If income is directed to be paid to a parent "for" or "towards" the maintenance of children, and, in case of their death under twenty-one, the share of each with all accumulations is to go to the survivors, the father having maintained the children is entitled to the income without

*Andrews v. Partington*, 3 id. 60; 2 Cox, 223; *Hamley v. Gilbert*, Jac. 354; *Thompson v. Griffin*, 1 Cr. & Ph. 317. To apply the income of an infant's property in the hands of a trustee to the maintenance of the infant is to convert it into a gift to the father, which the donor does not generally intend. *Addison v. Bowie*, 2 Bland, 606; *Spear v. Spear*, 9 Rich. Eq. 188.

<sup>1</sup> *Mundy v. Howe*, 4 Bro. Ch. 224; *Meachey v. Young*, 2 Myl. & K. 490; *Stocken v. Stocken*, 4 Myl. & Cr. 95; 4 Sim. 152; *Stephens v. Lawry*, 2 N. C. C. 87; *White v. Grane*, 18 Beav. 571; *Ransome v. Burgess*, L. R. 3 Eq. 773.

<sup>2</sup> *Thompson v. Griffin*, 1 Cr. & Ph. 322.

<sup>3</sup> *Brophy v. Bellany*, L. R. 8 Ch. 798.

<sup>4</sup> *Brown v. Casamajor*, 4 Ves. 498; *Hammond v. Neame*, 1 Swanst. 35; *Blackburn v. Byne*, 26 Beav. 41.

151; 30 Am. L. Reg. (N. S.) 20, 28; and future dividends from an infant's estate may, by the court's order, be paid to its father on his undertaking to apply them to its maintenance, clothing, and education. *In re Birch's Trustees*, 15 L. R. Ir. 380; see *In re Lofthouse*, 29 Ch. D. 921; *Wilson v. Turner*, 22 Ch. D. 521; *In re Bryant*, [1894] 1 Ch. 324.

an account.<sup>1</sup> (a) Where the income of a life-estate under a marriage settlement was given to parents for the support of their children, and they became bankrupt, the court ordered the whole income to be applied to the support of the children.<sup>2</sup> But where there is a provision to parents for the maintenance of their children, and a third person voluntarily supports one of the children, the parents being ready to render such support, they cannot be called upon to reimburse such third person, nor can the fund be charged.<sup>3</sup> Where a testatrix devised her property, in trust to apply the income to the maintenance of the children of her daughter M., who at that time had four children, and who afterwards married again and had five other children, it was held that the maintenance must be applied to the support of all the children, and that it commenced with their birth, and continued during their minority, or until the females were married.<sup>4</sup> If the trustee has a discretion, he cannot apply the whole income, if the infant can be properly maintained on a less sum.<sup>5</sup>

§ 613. A stepfather is not compelled to maintain his wife's children, and he will be entitle to receive maintenance out of the income, if the trustee can pay it for that purpose;<sup>6</sup> (b) but if the support of the infant costs the stepfather nothing, though the ward lives with him, he will not be

<sup>1</sup> *Browne v. Paull*, 1 Sim. (N. S.) 92; 15 Jur. 5; *Hadow v. Hadow*, 9 Sim. 438; *Rainsford v. Rainsford*, Rice, Eq. 343.

<sup>2</sup> *Dalton's Settlement*, 1 De G., M. & G. 265.

<sup>3</sup> *Crawford v. Patterson*, 11 Grat. 364.

<sup>4</sup> *Connor v. Ogle*, 4 Md. Ch. 425.

<sup>5</sup> *McKnight v. Walsh*, 24 N. J. Eq. 498.

<sup>6</sup> *Freto v. Brown*, 4 Mass. 675; *Gay v. Ballou*, 4 Wend. 403.

<p>(a) This does not apply when the income is not given to the trustee, but he is clothed only with a power to use it for the support and education of the beneficiary. <i>Neal v. Bleckley</i>, 51 S. C. 506, 531.</p>	<p>(b) <i>Re Dissenger</i>, 39 N. J. Eq. 227; <i>Livingston v. Hammond</i>, 162 Mass. 375; <i>Ellis v. Cary</i>, 74 Wis. 176; <i>McMahill v. McMahon</i>, 113 Ill. 461; <i>Gerber v. Bauerline</i>, 17 Oregon, 115.</p>
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allowed anything.<sup>1</sup> So a mother is not legally obliged to support her children, whether she is living with the husband by whom she had the children, or is a widow, or is married to a second husband; therefore she is entitled to maintenance out of the income of the trust fund.<sup>2</sup> If a father makes application for maintenance out of the income of his children in the hands of trustees, it will be referred to a master to inquire and report respecting the father's ability to support them.<sup>3</sup> But no inquiry is made when the mother makes application for maintenance, as her ability is immaterial, she not being obliged to maintain her children.<sup>4</sup> If the fact of the poverty of the father is apparent, the court will not send the matter for inquiry,<sup>5</sup> nor if the property is small,<sup>6</sup> or no allowance is asked for.<sup>7</sup> If the children are taken from the custody of a father on account of his misconduct, the court must order maintenance for them out of the income in the hands of trustees, as there is no principle upon which a court can take children from a father, and then order him to support them from his own means, in a manner dictated by the court.<sup>8</sup>

<sup>1</sup> Booth v. Sineath, 2 Strob. Eq. 31.

<sup>2</sup> Haley v. Bannister, 4 Mod. 275; Hodgson v. Hodgson, 4 Cl. & Fin. 323; 11 Bligh (n. s.) 62; Llo. & Goo. Sugd. 259; Llo. & Goo. Plunk. 137; Lanoy v. Athol, 2 Atk. 447; *Ex parte* Petre, 7 Ves. 403; Beasley v. Magrath, 2 Sch. & L. 35; Greenwell v. Greenwell, 5 Ves. 194; Douglass v. Andrews, 12 Beav. 310; Heyward v. Cuthbert, 4 Des. 445; Matter of Bostwick, 4 Johns. Ch. 100; Whipple v. Dow, 2 Mass. 415; Dawes v. Howard, 4 Mass. 97; Bruin v. Knott, 1 Phil. 573; Anderton v. Yates, 5 De G. & Sm. 202; Smee v. Martin, 1 Bunb. 131.

<sup>3</sup> Hughes v. Hughes, 1 Bro. Ch. 386; Lucknow v. Brown, 12 Jur. 1017; McKnight v. Walsh, 23 N. J. Eq. 136.

<sup>4</sup> Billingsley v. Critchett, 1 Bro. Ch. 268; Douglass v. Andrews, 12 Beav. 311, n.

<sup>5</sup> *Ex parte* Mountford, 15 Ves. 449; *In re* England, 1 R. & M. 499; Payne v. Low, id. 223.

<sup>6</sup> Walker v. Shore, 15 Ves. 387; *Ex parte* Swift, 1 R. & M. 575; Payne v. Low, id. 223; *Ex parte* Dudley, 1 J. & W. 254, n.

<sup>7</sup> *In re* Neale, 15 Beav. 250.

<sup>8</sup> Wellesley v. Beaufort, 2 Russ. 29; 2 Bligh n. s. 124.

§ 614. In inquiring into the ability of a father to support his children, no account will be made of the fortune of his wife settled to her own use, as the property of the wife is in no way bound for the maintenance of the children.<sup>1</sup> In making the inquiry, reference will be had to the position of the children in society, their expectations, and the relative style and expense in which they ought to live; as where a father had £6,000 per year, maintenance was allowed to enable him to educate his children properly for the position which they would probably fill.<sup>2</sup> In all these matters, the best interests of the children are consulted, rather than mere pecuniary considerations;<sup>3</sup> as where two infant daughters were entitled to a large fortune on coming of age, and had an income of \$4,000 per year, their father not being able to keep a house in accordance with their expectations and future prospects, an allowance of \$2,500 per year was made to him, that he might keep up an establishment proper for his daughters, and educate them at home, although the expense of sending them to a boarding-school would not have been more than \$1,200 per year.<sup>4</sup> Such an allowance will be made, that the wards may have the means of bestowing charity, where the fortune is ample, and such an expenditure reasonable.<sup>5</sup> Regard will be had to all the circumstances of the family, as where there was a large number of young children, and all were destitute, a liberal allowance was made for the maintenance of an older boy, in order that the younger children might be better maintained and educated.<sup>6</sup> So a liberal maintenance will be allowed to relieve

<sup>1</sup> *Ante*, § 613.

<sup>2</sup> *Jervoise v. Silk*, 1 Geo. Cooper, 52; *Ex parte Williams*, 2 Col. C. C. 740; *Moulton v. DeM'Carty*, 6 Rob. (N. Y.) 533.

<sup>3</sup> *Ex parte Burke*, 4 Sandf. Ch. 617; *Owens v. Walker*, 2 Strob. Eq. 289. But see *McKnight v. Walsh*, 23 N. J. Eq. 136.

<sup>4</sup> *Ibid*.

<sup>5</sup> *Langton v. Brackenburgh*, 2 Col. C. C. 446.

<sup>6</sup> *Pierpont v. Cheney*, 1 P. Wms. 493; *Harvey v. Harvey*, 2 P. Wms. 22; *Lanoy v. Athol*, 2 Atk. 447; *Ex parte Petre*, 7 Ves. 403; *Tweddell v. Tweddell*, T. & R. 13; *Ex parte Williams*, 2 Col. C. C. 740; *Petre v. Petre*, 3 Atk. 511; *Bradshaw v. Bradshaw*, 1 J. & W. 647.

the distress of the parents,<sup>1</sup> even where the indigence arises from their own misconduct.<sup>2</sup>

§ 615. Upon these principles, courts will order maintenance for infants out of their income, where the father is unable to support them. (*a*) This inability does not mean absolute poverty, but an inability to give the child an education suitable to his fortune and expectations.<sup>3</sup> The allow-

<sup>1</sup> *Roach v. Gavan*, 1 Ves. 160; *Hill v. Chapman*, 2 Bro. Ch. 231; *Heysham v. Heysham*, 1 Cox, 179.

<sup>2</sup> *Allen v. Coster*, 1 Beav. 202.

<sup>3</sup> *Buckworth v. Buckworth*, 1 Cox, 80; *Jervoise v. Silk*, Coop. 52; *Matter of Burke*, 4 Sandf. Ch. 617; *Rice v. Tonnele*, id. 568; *Heyward v. Cuthbert*, 4 Des. 445; *Wilkes v. Rogers*, 6 Johns. 566; *McKnight v. Walsh*, 24 N. J. Eq. 498.

(*a*) As to support and maintenance through trustees, Mr. Gray (on Alienations, §§ 140, 269) concludes that the present English law is substantially as follows:—(1) If the income of trust property is to be paid to A. during his life, a direction that it shall be paid into his own hands, or that he shall not alienate or anticipate it, or that it shall not be liable for his debts, is void. (2) If trustees are directed to apply the income of a trust fund for the support and benefit of A. at such times and manner as they may deem fit, but have no authority to apply it in any other way, his assignee can demand the income from the trustees. (3) If trustees are directed to apply the income of a trust fund for the support or benefit of A. and other purposes, but they have no right to exclude A., then A.'s assignee can claim from the trustees the amount which A. could have claimed should be applied for his benefit. (4) If trustees are directed to apply the income of a trust fund for the support or benefit of A., or for other purposes at their discretion, and they in fact apply the whole of the income for other purposes, the assignee of A. has no claim against the trustees. (5) If trustees are directed to pay the income of a trust fund to A., or to apply it for his support or benefit, or for other purposes at their discretion, they must account to A.'s assignee for any payments made to A. after notice of the assignment. (6) If trustees are directed to apply the income of a trust fund for the support or benefit of A., or for other purposes at their discretion, the question whether they must account to A.'s assignee for any sums not paid to him but spent for his support or benefit after notice of the assignment, seems to depend upon the same principle as No. 2, *supra*.

ance will be made, although the settlement contains no direction for maintenance, and although there is a direction to accumulate the income.<sup>1</sup> (a) Generally, application should be made to the court for leave to apply the income in that way, but the trustees may apply the income for maintenance without an express decree, taking the risk of having it disallowed by the court.<sup>2</sup> There is a difference between past expenses and an allowance for future maintenance. If a trustee takes the risk of supporting the infant, he will be allowed only for actual expenses;<sup>3</sup> (b) but if an application is made for future maintenance, a liberal allowance is made according to the circumstances of the case.<sup>4</sup> And the court has power to order trustees to anticipate the time of payment upon a case made showing the necessity of maintenance.<sup>5</sup> In England, a father cannot have an allowance for past expenses, except under peculiar circumstances.<sup>6</sup> And the court may disallow all the payments for maintenance, if

<sup>1</sup> *Ibid.*; *Greenwell v. Greenwell*, 5 Ves. 194, 195, n.; 197, n.; *Evans v. Massey*, 1 Y. & J. 196; *Stretch v. Watkins*, 1 Madd. 253.

<sup>2</sup> *Rice v. Tonnele*, 4 Sandf. Ch. 568; *Bethea v. McColl*, 5 Ala. 312; *Corbin v. Wilson*, 2 Ashm. 178; *Newport v. Cook*, id. 337.

<sup>3</sup> *Bruin v. Knott*, 1 Phil. 572, overruling 12 Sim. 436; *Ex parte Bond*, 2 Myl. & K. 439; *Stephens v. Lawry*, 2 Y. & Col. Ch. 87; *Corbin v. Wilson*, 2 Ashm. 178; *Newport v. Cook*, id. 337; *Matter of Bostwick*, 4 Johns. Ch. 100.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Rhoades v. Rhoades*, 43 Ill. 239.

<sup>6</sup> *Reeves v. Brymer*, 6 Ves. 425; *Sherwood v. Smith*, id. 454; *Presley v. Davis*, 7 Rich. Eq. 109. See *Carmichael v. Hughes*, 20 L. J. Ch. 396; *Ransome v. Burgess*, L. R. 3 Eq. 773.

(a) The express intention of a testator should not, of course, be interfered with. In *Havelock v. Havelock*, 17 Ch. D. 807, where there was a direction to accumulate, the court felt justified in making an allowance for the benefit of infants, on the ground of want; and this was followed in *Re Collins*, 32 Ch. D. 229. But in *Kemmis v. Kemmis*, 13 L. R. Ir. 372; 15 id. 90, this decision was disapproved, and it was held that when there is an imperative trust to accumulate, the court cannot make an allowance for maintenance. See also *Re Smeed*, 54 L. T. 929.

(b) See *Brown v. Smith*, 10 Ch. D. 377.

they were made improperly and without leave first obtained.<sup>1</sup> If, however, the circumstances are such that the court would have made the allowance if asked, they will be allowed.<sup>2</sup> If the annual amount to be paid for the infant's support is named in the instrument of trust, the trustee of his own motion cannot exceed that amount,<sup>3</sup> unless he is clothed with a discretion;<sup>4</sup> but if the fund goes absolutely to the infant, the court can increase the amount if the circumstances require it.<sup>5</sup> If the exigencies are very pressing, the court will increase the amount although there is a direction for accumulation, and the infant's interest is contingent.<sup>6</sup> If there are two funds from which maintenance may be ordered, it will be ordered from that fund from which it will be most beneficial for the infant to take it.<sup>7</sup> If maintenance is directed for the infant until twenty-one, its marriage does not determine the maintenance;<sup>8</sup> (a) and if the maintenance

<sup>1</sup> *Andrews v. Partington*, 3 Bro. Ch. 60; *Cotham v. West*, 1 Beav. 381; *Bridge v. Brown*, 2 Y. & C. Ch. 187.

<sup>2</sup> *Lee v. Brown*, 4 Ves. 369; *Barlow v. Grant*, 1 Vern. 255; *Franklin v. Green*, 2 Vern. 137; 1 Rep. Leg. 768; *Sisson v. Shaw*, 9 Ves. 288; *Maberly v. Turton*, 14 Ves. 499; *Ex parte Darlington*, 1 B. & B. 241.

<sup>3</sup> *Hearle v. Greenbank*, 2 Atk. 697, 716; *Long v. Long*, 3 Ves. 286, n.

<sup>4</sup> *Rawlins v. Goldfrap*, 5 Ves. 440.

<sup>5</sup> *Aynsworth v. Pratchett*, 13 Ves. 321; *Allen v. Coster*, 1 Beav. 202; *Josselyn v. Josselyn*, 9 Sim. 63; *Stretch v. Watkins*, 1 Madd. 253; *Newport v. Cook*, 2 Ashm. 332; *Corbin v. Wilson*, id. 178; *Evans v. Massey*, 1 Y. & J. 196.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Bruin v. Knott*, 1 Phil. 572; *Lygon v. Lord*, 14 Sim. 41; *Rawlins v. Goldfrap*, 5 Ves. 440; *Foljambe v. Willoughby*, 2 S. & S. 165; *Re Ashley*, 1 R. & M. 371; *Winch v. Winch*, 1 Cox, 433; *Methold v. Turner*, 20 L. J. Ch. 201; *Chisolm v. Chisolm*, 4 Rich. Eq. 266.

<sup>8</sup> *Chambers v. Goldwin*, 11 Ves. 1.

(a) In England, Lord Cranworth's Act (23 and 24 Vict. ch. 145) extended in effect to all infants the benefit which, in the case here cited, the court had previously extended to infants for whom a provision had been made on the contingency of their attaining twenty-one, by a parent or a person standing *in loco parentis*. *In re Cotton*, 1 Ch. D. 232. See *In re George*, 5 Ch. D. 837; *In re Judkin's Trusts*, 25 id. 743; *In re Dickson*, 28 id. 291.

is directed during the life of A., the allowance will continue during the life of A., although the children are more than twenty-one years of age.<sup>1</sup> (a) If maintenance is directed, but no time is limited, it will cease when the infants are of age.<sup>2</sup> In making the allowance the trustee is not confined to the income of the year; but he may set off the gross amount of the maintenance against the gross amount of income.<sup>3</sup> If maintenance is directed by will during minority, and the property is given over in case the infant dies under age, the court will not permit the infant to be deprived of proper maintenance for the benefit of the remainder-man, nor will it permit a wasteful maintenance in disregard of the contingent rights of others.<sup>4</sup>

§ 616. A distinction is made between property coming to a child from a parent, or from a person in the place of a parent, and property given in trust for an infant by a stranger. When the gift comes from parents, or persons in the place of parents, whose duty it is to support the children, maintenance will be ordered where the subject of the trust is residuary personal estate, or a contingent interest only, although there was no power in the will, and there was an express direction for an accumulation, and although there was a gift over to other children, if the chance of survivorship is equal.<sup>5</sup> If the chance of survivorship is not equal,

<sup>1</sup> *Badham v. Mee*, 1 R. & M. 631.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Carmichael v. Wilson*, 3 Moll. 79; *Edwards v. Grove*, 2 De G., F. & J. 210.

<sup>4</sup> *Curtis v. Smith*, 6 Blatch. 537.

<sup>5</sup> *Aherley v. Vernon*, 1 P. Wms. 783; *Rogers v. Soutten*, 2 Keen, 598; *Inledon v. Northcote*, 3 Atk. 433; *Harvey v. Harvey*, 2 P. Wms. 22; *Lambert v. Parker*, Coop. 143; *Brown v. Temperly*, 3 Russ. 263; *Mills v. Robarts*, 1 R. & M. 555; *Ex parte Chambers*, id. 577; *Boddy v. Dawes*, 1 Keen, 362; *Rhoades v. Rhoades*, 43 Ill. 239; *Fairman v. Green*, 10 Ves. 45; *Lomax v. Lomax*, 11 Ves. 48; *Mole v. Mole*, 1 Dick. 310; *Greenwell v. Greenwell*, 5 Ves. 194; *Cavendish v. Mercer*, id. 195; *Collis v. Blackburn*, 9 Ves. 470; *McDermot v. Kealy*, 3 Russ. 264; *Stretch v. Watkins*,

(a) See *In re Cooper*, 27 Ch. D. 565.

maintenance will not be allowed;<sup>1</sup> nor will it, if the interest is real estate and contingent or residuary.<sup>2</sup> But maintenance will be refused out of a contingent interest, or where the fund is given over; or where the gift proceeds from a stranger, or from a grandfather; or where the infant is a natural child not adopted by the father.<sup>3</sup>

§ 617. If the fund goes absolutely to the infant, and no conflicting interests can arise, the order for maintenance will be made on petition and without suit.<sup>4</sup> But if there are opposing and complicated interests, the court will not act without a regular suit and notice to all parties.<sup>5</sup>

§ 618. It is a settled rule, that trustees for infants should never, on their own authority, break in upon the capital of the trust fund for the maintenance, and seldom for the advancement of their ward. This is a rule for the protection of children, and if trustees break it, their accounts will be disallowed, although the particular case is a hardship; as it is better that a single individual should suffer a hardship which he might have avoided, than that the interests of all

1 Madd. 253; Seibert's App., 19 Penn. St. 49; Corbin v. Wilson, 2 Ashm. 208; Newport v. Cook, id. 342; Matter of Ryder, 11 Paige, 185; *Ex parte* Kebble, 11 Ves. 604; Turner v. Turner, 4 Sim. 434.

<sup>1</sup> Errat v. Barlow, 14 Ves. 202; Kime v. Welpitt, 3 Sim. 533; Turner v. Turner, 4 Sim. 430; Cannings v. Flower, 7 Sim. 523.

<sup>2</sup> Green v. Ekins, 2 Atk. 476; Bullock v. Stones, 2 Ves. 521; Leake v. Robinson, 2 Mer. 384.

<sup>3</sup> Errington v. Chapman, 12 Ves. 24; Lowndes v. Lowndes, 15 Ves. 301. But see Greenwell v. Greenwell, 5 Ves. 194. In Seibert's App., 19 Penn. St. 49, maintenance was allowed, though the gift came from a grandfather not in *loco parentis*. See Chisolm v. Chisolm, 4 Rich. Eq. 266, and Corbin v. Wilson, 2 Ashm. 208.

<sup>4</sup> *Ex parte* Whitfield, 2 Atk. 315; *Ex parte* Kent, 3 Bro. Ch. 88; *Ex parte* Salter, id. 500; *Ex parte* Mountfort, 15 Ves. 445; *Ex parte* Starkie, 3 Sim. 399; *Ex parte* Chambers, 1 R. & M. 577; *Ex parte* Green, 1 J. & W. 253; *Ex parte* Myercough, id. 151; *Ex parte* Hayes, 13 Jur. 765; 3 De G. & Sm. 485; Matter of Bostwick, 4 Johns. Ch. 100; Rice v. Tonnele, 3 Sandf. Ch. 571; Cross v. Bevan, 2 Sim. (N. S.) 53.

<sup>5</sup> Fairman v. Green, 10 Ves. 45.

infants should be endangered.<sup>1</sup> Sir William Grant expressed a doubt whether the court itself had power to authorize the expenditure of the trust fund for the infant's support and advancement.<sup>2</sup> It is now, however, well established, that the court has such power, and will exercise it with caution in a proper case.<sup>3</sup> But if the trustee exercises the power by breaking in upon the trust fund for mere maintenance, without leave of the court, he will be compelled to replace it.<sup>4</sup> It has been said, that a trustee may pay from the capital fund upon his own authority in case of necessity;<sup>5</sup> but it would not be safe to follow this. The burden would be on the trustee to prove a case of necessity, and that it was impossible to apply to a court for direction; for courts look with disfavor upon the assumption of such authority by guardians and trustees.<sup>6</sup> When such a case can be made,

<sup>1</sup> *Per* Sir R. P. Arden, *Walker v. Wetherell*, 6 Ves. 473; *Davis v. Austen*, 1 Ves. Jr. 247; *Lee v. Brown*, 4 Ves. 362; *Anon.*, *Moseley*, 41; *Davis v. Harkness*, 1 Gilm. 173; *Prince v. Logan*, *Spears*, Eq. 29; *McDowell v. Caldwell*, 2 McCord, Ch. 43; *Davis v. Roberts*, 1 Sm. & M. Ch. 543; *Hester v. Wilkinson*, 6 Humph. 219; *Frelick v. Turner*, 26 Miss. 393; *Martin's App.*, 23 Penn. St. 438; *Petit's App.*, 39 id. 324; *Villard v. Chovin*, 2 Strob. Eq. 40; *Bybee v. Thorp*, 4 B. Mon. 313; *Carter v. Rolland*, 11 Humph. 339; *Cornwise v. Bourgum*, 2 Ga. Dec. 15; *Haigood v. Wells*, 1 Hill, Eq. 59; *Swinnock v. Crisp*, *Freem.* 78; *Caffey v. McMichael*, 64 N. C. 507; *Matter of Bostwick*, 4 Johns. Ch. 101.

<sup>2</sup> *Walker v. Wetherell*, 6 Ves. 474.

<sup>3</sup> *Barlow v. Grant*, 1 Vern. 255; *Ex parte Green*, 1 J. & W. 253; *Ex parte Chambers*, 1 R. & M. 577; *Ex parte Knott*, id. 499; *Ex parte Swift*, id. 575; *Evans v. Massey*, 1 Y. & J. 196; *Bridge v. Brown*, 2 N. C. C. 181; *Williams's Case*, 3 Bland, 186; *Ex parte Potts*, 1 Ashm. 340; *Ex parte Bostwick*, 4 Johns. Ch. 100; *Long v. Norcom*, 2 Ired. Eq. 354; *Haigood v. Wells*, 1 Hill, Eq. 79; *Maupin v. Dulany*, 5 Dana, 593; *Worthington v. McCreer*, 23 Beav. 81; *Prince v. Hine*, 26 id. 634; *Ex parte Hayes*, 3 De G. & Sm. 485; 13 Jur. 762; *Ex parte Allen*, 3 De G. & Sm. 485; *Withers v. Hickman*, 6 B. Mon. 293; *Prince v. Logan*, 1 *Spears*, Eq. 29; *Teague v. Dendy*, 2 McCord, Ch. 207.

<sup>4</sup> *Davis v. Austen*, 3 Bro. Ch. 178; *Lee v. Brown*, 4 Ves. 362; *Walker v. Wetherell*, 6 Ves. 473.

<sup>5</sup> *Davis v. Austen*, 3 Bro. Ch. 178; *Barlow v. Grant*, 1 Vern. 255; *Carmichael v. Wilson*, 3 Moll. 79; *Bridge v. Brown*, 2 Y. & Col. Ch. 181.

<sup>6</sup> *Prince v. Logan*, *Spears*, Eq. 29; *Teague v. Dendy*, 2 McCord, Ch.



the trustee will be allowed the amount paid out, in his accounts.<sup>1</sup> Courts are much more willing to authorize an expenditure of the capital fund of the trust to establish the minor in life, or to pay his entrance fee as an apprentice, or to educate him properly for business and life, than for mere maintenance. In such cases courts look upon the capital, not as consumed and extinguished, but as converted into another and useful form.<sup>2</sup> This allowance from the capital fund is confined to cases where the trust fund is small: if the capital consists of several thousand pounds, and the income is sufficient to educate and support the infant, the court will not allow nor justify any expenditure of the principal.<sup>3</sup> (a)

§ 619. Where there is a limitation over to a stranger on the death of the infant, neither the trustee nor the court can expend any part of the capital fund for the maintenance or advancement of the ward. As where £100 were given to

207; *McDowell v. Caldwell*, id. 43; *Davis v. Roberts*, 1 Sm. & M. Ch. 543; *Myers v. Wade*, 6 Rand. 444; *Davis v. Harkness*, 1 Gilm. 173; *Holmes v. Joslin*, 5 Strob. 31; *Downey v. Bullock*, 7 Ired. Eq. 102; *Villard v. Chovin*, 2 Strob. Eq. 40.

<sup>1</sup> *Long v. Norcom*, 2 Ired. Eq. 354; *Sparhawk v. Buell*, 9 Vt. 41; *Withers v. Hickman*, 6 B. Mon. 203; *Matter of Bostwick*, 4 Johns. Ch. 100.

<sup>2</sup> *Williams's Case*, 3 Bland, 186; *Hanson v. Chapman*, id. 198; *Matter of Bostwick*, 4 Johns. Ch. 100; *Barlow v. Grant*, 1 Vern. 255; *Franklin v. Green*, 2 Vern. 137; *In re England*, 1 R. & M. 499; *Ex parte Chambers*, id. 577; *Re Welch*, 23 L. J. Ch. 344; *Nunn v. Harvey*, 2 De G. & Sm. 301; *Re Clarke*, 17 Jur. 362; *Re Lane*, id. 219; *Worthington v. McCreer*, 23 Beav. 81; *Ex parte Swift*, 1 R. & M. 575; *Ex parte Green*, 1 J. & W. 253; *Bridge v. Brown*, 2 Y. & Col. Ch. 181; *Davies v. Davies*, 2 De G., M. & G. 53; *Walsh v. Walsh*, 1 Drew. 64; *Ex parte Hayes*, 3 De G. & Sm. 485; *Swinnoek v. Crisp*, Freem. 78; *Ex parte McKey*, 1 B. & B. 405; *Sisson v. Shaw*, 9 Ves. 285; *Prince v. Hine*, 26 Beav. 634.

<sup>3</sup> *Barlow v. Grant*, 1 Vern. 255; *Davis v. Austen*, 1 Ves. Jr. 247; 3 Bro. Ch. 178; *Beasley v. Magrath*, 2 Sch. & Lef. 35; *Deen v. Cozzens*, 7 Rob. (N. Y.) 178.

(a) See *In re Moody*, [1895] 1 Ch. 309; *In re Wise*, [1896] 1 Ch. 101; *In re Woodin*, [1895] 2 281.

trustees to apply the income to the support and education of an infant, and to transfer the principal to him at twenty-one; but if he died under that age, the said sum was to be paid over to other persons, the court refused leave to expend any part of the capital.<sup>1</sup> Where an infant, upon a certain contingency, was to lose certain rights, and the trustee made an advancement before the contingency happened, and it afterwards happened in the ward's favor, the advancement was allowed to the trustee.<sup>2</sup> So where a legacy is given to a class of children, with a limitation over to the others in case of the death of one before marriage or twenty-one, an allowance may be made, on the ground that all have an equal chance of surviving, before their particular proportions are vested so that they cannot be divested.<sup>3</sup> An advancement may be made if all the parties in remainder are competent to consent, and do consent to the allowance.<sup>4</sup> But advancements cannot be made where the gift is to a class of children, though not absolutely to them, but in certain events to go over to a stranger.<sup>5</sup> (a) If the limitation over is to the issue of a deceased child, such issue is a stranger, and no allowance can be made.<sup>6</sup> So where the children in being are not all the persons interested in the fund, as where another child may be born.<sup>7</sup> If a legacy is given to children when they become twenty-one, the court cannot anticipate

<sup>1</sup> *Lee v. Brown*, 4 Ves. 362; *Van Vechten v. Van Vechten*, 8 Paige, 104; *Deen v. Cozzens*, 7 Rob. (N. Y.) 178.

<sup>2</sup> *Worthington v. McCreer*, 23 Beav. 81.

<sup>3</sup> *Franklin v. Green*, 2 Vern. 137; *Greenwell v. Greenwell*, 5 Ves. 194, and notes; *Brandon v. Aston*, 2 Y. & Col. Ch. 30; *Marshall v. Holloway*, 2 Swanst. 436.

<sup>4</sup> *Evans v. Massey*, 1 Y. & J. 196; *Cavendish v. Mercer*, 5 Ves. 195, n.

<sup>5</sup> *Ex parte Kebble*, 11 Ves. 604, overruling *Greenwell v. Greenwell*, 6 Ves. 194; *Errington v. Chapman*, 12 Ves. 20.

<sup>6</sup> *Ex parte Kebble*, 11 Ves. 606; *Turner v. Turner*, 4 Sim. 430; *Errington v. Chapman*, 12 Ves. 20; *Ex parte Whitehead*, 2 Y. & J. 243; *Fendall v. Nash*, 5 Ves. 197, n.; *contra*, but disapproved by Lord Eldon, 14 Ves. 203.

<sup>7</sup> *Ex parte Kebble*, 11 Ves. 604.

(a) See *Best v. Donmall*, 40 L. J. Ch. 160.

the time and make an allowance,<sup>1</sup> as it may not come to them at all. If, however, there is a clear intention, to be gathered from the whole will, that the children are to have a maintenance, the court will order it, although there is a gift over.<sup>2</sup>

§ 620. When a trust is created, and the trustees are directed to pay the income to a person for the support of his children, he will be entitled to receive the income so long as he continues to maintain them.<sup>3</sup> Where the income was directed to be paid by the trustees to M. H. H. for the maintenance of her children, the fund to be divided among her children at twenty-one, and, in default of issue, over to another person, it was held that the income was payable to M. H. H., although she had no child.<sup>4</sup> Where a widow was to receive the income from trustees for the support of herself and children, and she eloped, she was held entitled only to a part of the income.<sup>5</sup> So where a trustee was to pay the income to the testator's son for the support of himself and children, and the son misapplied the income, the court said that he took the income as a subtrustee for his wife and children, and that the court had power to regulate and control it, by directions to the original trustee, in such manner as to accomplish the purpose for which it was given.<sup>6</sup> The

<sup>1</sup> *Lomax v. Lomax*, 11 Ves. 48. See *Haley v. Bannister*, 4 Madd. 275; *Errat v. Barlow*, 14 Ves. 202; *Cannings v. Flower*, 7 Sim. 253; *Turner v. Turner*, 4 Sim. 430.

<sup>2</sup> *Lambert v. Parker*, G. Coop. 143.

<sup>3</sup> *Hadow v. Hadow*, 9 Sim. 438; *Jubber v. Jubber*, id. 503; *Berkely v. Swinburne*, 6 Sim. 613; *Thurston v. Essington*, Jac. 361, n.; *Longmore v. Elcum*, 2 Y. & Col. Ch. 363; *Leach v. Leach*, 13 Sim. 304; *Hart v. Tribe*, 19 Beav. 149; *Brown v. Paull*, 1 Sim. (N. S.) 92; *Hammond v. Neame*, 1 Swanst. 35; *Raikes v. Ward*, 1 Hare, 445; *Crockett v. Crockett*, 2 Phil. 553; *Chase v. Chase*, 2 Allen, 104; *Loring v. Loring*, 100 Mass. 340.

<sup>4</sup> *Hammond v. Neame*, 1 Swanst. 35; *Loring v. Loring*, 100 Mass. 340.

<sup>5</sup> *Castle v. Castle*, 3 Jur. (N. S.) 723; 1 De G. & J. 352; *Loring v. Loring*, 100 Mass. 340.

<sup>6</sup> *Chase v. Chase*, 2 Allen, 104; *Loring v. Loring*, 100 Mass. 340.

fund is in some sort payable to the father, but the trustee will be held accountable for its proper application.<sup>1</sup> In paying the income for maintenance, the trustee must exercise a sound discretion. He may apply it himself, or he may place it in the hands of parents or guardians; but he must not place it in the hands of a beneficiary, who mentally or morally is incapable of using it properly or profitably; and he must not allow the income to be thrown away, or perverted from its purpose.<sup>2</sup>

§ 621. In most respects, the relation between the trustee and an infant *cestui que trust* is the same as between trustees and other *cestuis que trust*. An infant has the same remedies for a breach of trust as if of full age. If a trustee employs the infant's money in his own business, the infant has an election to take the profits or the interest;<sup>3</sup> or if an improper investment is made by the trustee, the infant can enforce compensation for the loss.<sup>4</sup> If, by any neglect or violation of duty by a trustee, a loss happens to the infant, the trustee must make it up; as if a trustee should allow the statute of limitations to run without suit on a claim in favor of an infant, the trustee would be held to account for the loss.<sup>5</sup> So if he should suffer five years to elapse without claim, after a stranger had entered upon the infant's estate and levied a fine.<sup>6</sup> In all such cases the trustees will be

<sup>1</sup> *Andrews v. Partington*, 2 Cox, 223; *Robinson v. Tickell*, 8 Ves. 142; *Woods v. Woods*, 1 Myl. & Cr. 409; *Raikes v. Ward*, 1 Hare, 445; *Crockett v. Crockett*, 2 Phil. 553; *Webb v. Wool*, 2 Sim. (N. S.) 267; *Joddrell v. Joddrell*, 14 Beav. 397; *Biddles v. Biddles*, 16 Sim. 1; *Wetherell v. Wetherell*, 1 Keen, 80; *Brown v. Casamajor*, 4 Ves. 498; *Hamley v. Gilbert*, Jac. 354; *Collier v. Collier*, 3 Ves. 33.

<sup>2</sup> *Mason v. Jones*, 2 Barb. 248; *Gott v. Cook*, 7 Paige, 538; *Van Vechten v. Van Vechten*, 8 id. 104.

<sup>3</sup> *Anon.*, 2 Ves. 630.

<sup>4</sup> *Holmes v. Dring*, 2 Cox, 1; *Terry v. Terry*, Pr. Ch. 273.

<sup>5</sup> *Williams v. Otey*, 8 Humph. 563; *Smilie v. Biffle*, 2 Barr, 52; *Wyck v. East India Co.*, 3 P. Wms. 309; *Wooldredge v. Planters' Bank*, 1 Sneed, 297; *Worthy v. Johnson*, 10 Ga. 358; *Long v. Cason*, 4 Rich. Eq. 60; *Blake v. Allman*, 5 Jon. Eq. 407.

<sup>6</sup> *Huntington v. Huntington*, 3 P. Wms. 310, n.; *Allen v. Sayer*, 2

responsible for all the loss that occurs from their negligence or mismanagement.

§ 622. It is the duty of trustees to accumulate all the income of a trust for infants which is not employed in maintenance and education as before stated, whether a direction for such accumulation is contained in the instrument of trust or not. (a) This rule applies where the subject of the trust is a *residue* of the testator's personal estate, and the interest of the infant is *contingent*, as where the trust is for a child, "if" or "when" it becomes twenty-one.<sup>1</sup> But the rule will not apply where a *sum certain* is to be paid to the infant when twenty-one;<sup>2</sup> (b) nor to the income of real estate where such estate is given to the infant if he shall reach twenty-one;<sup>3</sup> unless there is a direction that the income in the mean time shall be used for the infant's benefit.<sup>4</sup> Without such direction the income in the first case would fall into the residue,<sup>5</sup> and in the second case it would go to the heirs-Vern. 368, is the other way, but it is not considered the true exposition of the law. *Pentland v. Stokes*, 2 B. & B. 75.

<sup>1</sup> *Green v. Ekins*, 2 Atk. 473; *Studholme v. Hodgson*, 3 P. Wms. 299; *Trevanion v. Vivian*, 2 Ves. 430; *Bullock v. Stones*, id. 521.

<sup>2</sup> *Leake v. Robinson*, 2 Mer. 363, 384.

<sup>3</sup> *Green v. Ekins*, 2 Atk. 473; *Studholme v. Hodgson*, 3 P. Wms. 299; *Bullock v. Stones*, 2 Ves. 521.

<sup>4</sup> *Bullock v. Stones*, 2 Ves. 430.

<sup>5</sup> *Ibid.*

(a) See *In re Wells*, 43 Ch. D. Trusts, 34 id. 716; *In re Jobson*, 281; *In re Humphreys*, [1893] 3 44 id. 155; *In re Thompson*, 44 Ch. 1; *In re Dallmeyer*, [1896] 1 W. R. 582.  
Ch. 372.

(b) A distinct legacy for maintenance has no effect upon the question whether the legacy is vested. See *In re Bunn*, 16 Ch. D. 47; *Watson v. Young*, 28 id. 436; *In re Bevan's Trusts*, 34 id. 716; *Re Martin*, 57 L. T. 471. When the trust fund is separated from the bulk of the testator's estate, the court favors its vesting early. *In re Wrey*, 30 Ch. D. 507; *In re Bevan's* A. C. 186, it was held that a legatee, whether an individual or a charity, corporate or incorporate, may terminate an accumulation which is exclusively for his benefit, and that when an accumulation is for more than twenty-one years from the testator's death, and is not effective, the Thellusson Act (*supra*, § 394) does not apply.

at-law.<sup>1</sup> If the infant takes a vested interest in the trust fund, and the payment only is postponed, and an accumulation is directed until he is twenty-four, he is absolutely entitled to the fund at twenty-one, and will be entitled to receive the income at that time, and the *corpus* of the trust at the time fixed, so that accumulation will cease at twenty-one.<sup>2</sup>

§ 623. The court has power to apply the income in support of the infant although he is abroad, or out of the jurisdiction of the court. In such cases the court may require a guardian<sup>3</sup> or attorney<sup>4</sup> to be appointed within the jurisdiction to receive the income; or the court may appoint a guardian who resides in the same jurisdiction with the infant, and who has been appointed guardian by the courts in that jurisdiction.<sup>5</sup> In some instances where the fund was small, the court has ordered not only the income, but the whole *corpus* of the trust, to be paid to the parents residing abroad,<sup>6</sup> or who were about emigrating.<sup>7</sup> If the trustee is within the jurisdiction, the court can take administration of the trust fund, and compel a proper application of the income to the purposes for which it was given;<sup>8</sup> and it may use its power to compel the parents residing abroad to bring the infants within the jurisdiction, by refusing any allowance from the income for maintenance.<sup>9</sup>

§ 624. If a trustee holds in his hands a sum of money to be paid absolutely to an infant, he must not pay it to the infant, nor to his father or other person, without the sanction of the court.<sup>10</sup> Should he do so, he may be compelled to

<sup>1</sup> Ibid.

<sup>2</sup> *Saunders v. Vautier*, 4 Beav. 115; Cr. & Ph. 240.

<sup>3</sup> *Logan v. Fairlee*, Jac. 193.

<sup>4</sup> *De Weever v. Rockport*, 6 Beav. 391; *In re Morrison*, 16 Sim. 42; *Hart v. Tribe*, 19 Beav. 149.

<sup>5</sup> *Daniel v. Newton*, 8 Beav. 485.

<sup>6</sup> *Volans v. Carr*, 2 De G. & Sm. 242.

<sup>7</sup> *Walsh v. Walsh*, 1 Drew, 64; *Ex parte Hayes*, 3 De G. & Sm. 485.

<sup>8</sup> *Chase v. Chase*, 2 Allen, 101.

<sup>9</sup> *Lockwood v. Fenton*, 1 Sm. & G. 73.

<sup>10</sup> *Furman v. Coe*, 1 Caines's Cas. 96; *Sparhawk v. Buell*, 9 Vt. 41.

pay it again to the infant when he comes of age.<sup>1</sup> Even a receipt or release taken from the infant under age is worthless;<sup>2</sup> but an infant, after coming of age, can confirm such payments by acts clearly intended to sanction and confirm them.<sup>3</sup> If the infant fraudulently represents himself to be of age, and thus procures payments from the trustees, he will be estopped to claim the fund again.<sup>4</sup> In the United States, guardians are appointed by probate courts to take charge of infants' estates. Such guardians are required to give bonds for the security of such estates, and payments may safely be made to them.<sup>5</sup> In some instances where the sums are small, courts have directed them to be paid directly to the persons maintaining the children, to save the expenses of obtaining guardianship.<sup>6</sup> Where the instrument of trust directs the manner of paying over the money, the trustee will be safe in following the directions.<sup>7</sup>

<sup>1</sup> *Dagley v. Tolferry*, 1 P. Wms. 285; *Phillips v. Paget*, 2 Atk. 80; *Davis v. Austen*, 3 Bro. Ch. 178; *Lee v. Brown*, 1 Ves. 369.

<sup>2</sup> *Overton v. Bannister*, 3 Hare, 503; 8 Jur. 996.

<sup>3</sup> *Dagley v. Tolferry*, 1 P. Wms. 285; *Lee v. Brown*, 4 Ves. 362; *Cooper v. Thornton*, 3 Bro. Ch. 97; *Cory v. Gertcken*, 2 Madd. 40.

<sup>4</sup> *Cory v. Gertcken*, 2 Madd. 40; *Overton v. Bannister*, 3 Hare, 503.

<sup>5</sup> *Furnam v. Coe*, 1 Caines' Cas. 96; *Sparhawk v. Buell*, 9 Vt. 41; *Hoyt v. Hilton*, 2 Edw. Ch. 202.

<sup>6</sup> *Farrance v. Viley*, 21 L. J. Ch. 313; *Ker v. Buxton*, 16 Jur. 491.

<sup>7</sup> 2 Wms. Ex'rs, 866; 1 Rop. Leg. 771; *Cooper v. Thornton*, 3 Bro. Ch. 96, 186; *Robinson v. Tickell*, 8 Ves. 142.

## CHAPTER XXII.

### TRUSTEES FOR MARRIED WOMEN.

- §§ 625, 626. Rights of married women to property at common law and in equity.  
 Settlements, see also § 645.
- § 627. Right of a married woman to a settlement of her equitable property.
- § 628. When proceedings must be taken to obtain a settlement.
- § 629. How the proceedings may be taken.
- § 630. A trustee may decline to pay to the husband before a settlement is made.
- § 631. In case of the marriage of a ward of court.
- § 632. Against whom the equity of a settlement will be enforced.
- §§ 633, 634. To what property a wife's right to a settlement extends.
- § 635. Where a wife is entitled to a second settlement.
- § 636. What amount will be settled on a wife.
- § 637. Where a husband refuses to make a settlement.
- § 638. Distinction between survivorship and the right to a settlement.
- Husband's possession and rights.
- § 639. Whether a husband has reduced a wife's *choses in action* to possession.
- §§ 640-642. What is and what is not a reduction to possession.
- § 643. Effect of a reduction to possession by the husband.
- § 644. Husband entitled to joint property.
- § 645. A settlement extends to children, when.
- § 646. The right of a married woman to hold property to her separate use, see § 667.
- § 647. How a trust for her separate use may be created.
- § 648. The words that create a separate use.
- § 649. Words that do not create a separate use.
- § 650. State of the authorities, and the general rule as to her separate use.
- § 651. Must be for the separate use of the wife alone.
- § 652. Changeable rights of a woman to property settled to her separate use.
- § 653. To what marriages the separate use extends.
- § 654. How a married woman may deal with her separate property, see §§ 668, 679, 682, 684, 685.
- § 655. General rule as to the right of a married woman to deal with her separate estate.
- § 656. As to real estate.
- § 657. Power to contract debts.
- §§ 658, 659. How far her contracts bind her separate estate.



- §§ 660, 661. Rules in England and the various States.
- § 662. Married woman not personally bound by her contracts.
- § 663. The principles that apply to a wife's separate estate.
- § 664. Savings and accumulations out of her separate estate.
- § 665. Rights of the wife against her husband's estate where he receives the income of her separate estate.
- § 666. If a husband receives her separate estate, he becomes a trustee.
- § 667. Right of a married woman to the possession of her separate estate.
- § 668. Disposition of a wife's separate estate by will, descent, or otherwise.
- § 669. Where a breach of trust is committed by a married woman or by her procurement.
- §§ 670, 671. Restraints upon anticipation or alienation by a married woman.
- §§ 672, 673. Deeds of separation between husband and wife.
- § 674. Rights of the wife under deeds of separation.
- § 675. Statutes of various States in relation to the rights of married women to property.
- § 676. These statutes do not affect rights which were vested before the passage of the statutes.
- § 677. Nor do they affect settlements made before the statutes.
- § 678. Husband and wife may be agents for each other. How far a husband may deal with his wife's separate property.
- § 679. A wife may give her separate property to her husband.
- § 680. Separate estate for married women under the statutes governed by same rules that governed separate estates under settlements.
- § 681. Right of husband to curtesy; cannot convey his right.
- § 682. Rights of married women to make wills under the statutes; rights of the husband in the absence of a will.
- § 683. Rights of married women to be trustees, &c., and to sue and be sued.
- § 684. A married woman may sell her personal property.
- § 685. But cannot convey her real estate without the consent of her husband.
- § 686. The statutes only refer to the property of married women. If they have no property, their rights are not altered.

§ 625. At common law, a husband became entitled to receive the rents and profits of his wife's real estate during their joint lives, and he became absolutely entitled to all her personal property in possession, and to all her *choses in action* if he reduced them to possession during his life. If he did not reduce them to possession, and survived her, he was entitled to be her administrator, and he thus took all her *choses in action*. He also was entitled to all her chattels real, and had full power to sell and convey them. But if the husband died without having aliened her chattels real, or without having reduced her *choses in action* to possession, she, as survivor, continued to hold them as if she had never been married. The principle was this: by the marriage the

husband became bound to pay all debts due from the wife before marriage; he also became bound to support and maintain the wife and her children in a proper manner. In consideration of these obligations, and to enable him to perform these duties, the law gave him the property of the wife as before stated. But the common law had this defect: the husband could sell and dispose of all the rights of property which he thus received from his wife, or he might become bankrupt the day after his marriage, and all these rights would go to his assignees or strangers, and he might be left entirely unable to perform the obligations and duties which were imposed upon him by marriage, and in consideration of which he received his wife's property. The common law had no power or machinery by which to afford a wife any protection or remedy under such circumstances. But in courts of equity remedies were devised whereby the property of a wife, or some portion of it, might be withdrawn from the operation of the rules of the common law, and preserved for her maintenance, in case her husband was improvident or unfortunate. This improvement in the law was effected through a system of trusts. It is apparent that trusts for women may be of two kinds: (1) Trusts for a woman generally, as for any other individual or individuals in the community; (2) Special trusts for a woman, with special provisions as to the ownership and enjoyment of the property or its income, and special directions as to the rights of any present or future husband over it. Growing out of this last class of trusts, there have been statutes passed changing the common law, and determining the rights of married women in and to property that they may possess at the time of their marriage, or that may come to them during marriage. It is the purpose of this chapter: (1) To discuss general trusts for women, and the rights and duties of trustees under them; (2) To consider special trusts for women, or trusts for their sole and separate use of their property, and the rights and duties of trustees; and (3) To notice the legislation of the several States respecting the property of married women.

§ 626. If a sum of money is given to trustees to pay either the principal or the income to a woman, and such woman is married at the time, or is married subsequently, the husband is entitled to receive the principal or the income, as the case may be. In law the husband has the same right to his wife's equitable property that he has to her legal property. All personal property held in trust for a wife belongs to the husband.<sup>1</sup> But this right of the husband over his wife's *choses in action* is perfected only by his reducing them to possession during his life; and the same rule applies to her equitable *choses in action*.<sup>2</sup> If such property is not reduced to possession during the life of the husband, the wife takes it, as survivor, as if she had never been married. If a wife dies before her *choses in action* have been reduced to possession by her husband, he may take administration of her estate, and thus entitle himself to receive all the personal property, legal and equitable, that came to her.<sup>3</sup> But nothing short of actual reduction to possession during his life will give a husband such right to the property as will defeat the wife's title, if she survives him. If, therefore, it cannot be reduced to possession during his life, as if it is a *reversion* only during the whole of his life, he can have no possession, and it will remain to her, if she survives him.<sup>4</sup> So, where the interest of the wife is partly possessory, and partly reversionary, the husband cannot bind the property beyond the duration of his own life.<sup>5</sup> So if a husband as-

<sup>1</sup> Murray v. Elibank, 10 Ves. 90; Glaister v. Hewer, 8 Ves. 206; Dunkley v. Dunkley, 2 De G., M. & G. 390; Napier v. Napier, 1 Dr. & W. 410; Mumford v. Murray, 1 Paige, 620; Shaw v. Mitchell, Davies, 216; Crook v. Turpin, 10 B. Mon. 244; *Ex parte* Blagden, 2 Rose, 251; Oswell v. Probert, 2 Ves. Jr. 680; Sturgis v. Champneys, 5 Myl. & Cr. 103.

<sup>2</sup> Murphy v. Grice, 2 Dev. & Bat. Eq. 199; Tidd v. Lister, 5 Madd. 432.

<sup>3</sup> Proudley v. Fielder, 2 Myl. & K. 57; Molony v. Kennedy, 10 Sim. 254; Drury v. Scott, 4 Y. & C. 264; Musters v. Wright, 2 De G. & Sm. 777.

<sup>4</sup> Purdew v. Jackson, 1 Russ. 1; Honner v. Morton, 3 Russ. 65; Stanton v. Hall, 2 Russ. & My. 175; Elliott v. Cordell, 5 Madd. 149; Tidd v. Lister, 17 Eng. L. & Eq. 567; 3 De G., M. & G. 857.

<sup>5</sup> Stiffe v. Everitt, 1 Myl. & Cr. 37; Harley v. Harley, 10 Hare, 335.

signs his wife's reversionary interest, and subsequently and during his life it becomes possessory, but is never reduced to actual possession, it survives to the wife.<sup>1</sup>

§ 627. A trustee may pay over a wife's equitable property to the husband if he pleases, and such payment will discharge the responsibility of the trustee. But if the trustee refuses to deliver the possession to the husband, and the husband, in order to reach the funds in the hands of the trustee and reduce them to possession, commences proceedings in equity, the court, on the maxim that he who seeks equity must do equity, may order a proper settlement to be made upon the wife out of her equitable property in the hands of the trustee. This is called the wife's equity to a settlement.<sup>2</sup> It is an

<sup>1</sup> *Ellison v. Elwin*, 13 Sim. 309; *Ashby v. Ashby*, 1 Col. 553; *Baldwin v. Baldwin*, 5 De G. & Sm. 319; *Hamilton v. Mills*, 29 Beav. 193.

<sup>2</sup> *Murray v. Elibank*, 13 Ves. 1; 1 Lead. Cas. Eq. 360; *Bosvil v. Branden*, 1 P. Wms. 458; *Browne v. Elton*, 3 P. Wms. 202; *Wallace v. Auldjo*, 2 Dr. & Sm. 216; *Osborn v. Morgan*, 9 Hare, 432; *Ward v. Amory*, 1 Curtis, 432; *Davis v. Newton*, 6 Met. 537; *Gassett v. Grout*, 4 Met. 486; *Carter v. Carter*, 14 Sm. & M. 59; *Stevenson v. Brown*, 3 Green, Ch. 503; *Tucker v. Andrews*, 13 Maine, 124; *Chase v. Palmer*, 25 id. 342; *Short v. Moore*, 10 Vt. 446; *Wilks v. Fitzpatrick*, 1 Humph. 54; *Page v. Estes*, 19 Pick. 269; *Barron v. Barron*, 29 Vt. 375; *Andrews v. Jones*, 10 Ala. 401; *Guild v. Guild*, 16 Ala. 122; *Wiles v. Wiles*, 3 Md. 1; *James v. Gibbs*, 1 Pat. & Heath, 277; *Carleton v. Banks*, 7 Ala. 34; *Van Duzer v. Van Duzer*, 6 Paige, 368; *Whitesides v. Dorris*, 7 Dana, 107; *Thomas v. Sheperd*, 2 McCord, Ch. 36; *Crook v. Turpin*, 10 B. Mon. 243; *Moore v. Moore*, 14 id. 259; *Lay v. Brown*, 15 id. 295; *Wardlaw v. Gray*, 2 Hill, Ch. 651; *Wright v. Arnold*, id. 642; *Poindexter v. Jeffries*, 15 Grat. 363; *Van Eppes v. Van Deusen*, 4 Paige, 64; *Dumond v. Magee*, 4 Johns. Ch. 315; *Corley v. Corley*, 22 Ga. 178; *Dearin v. Fitzpatrick*, Meigs, 551; *Gallego v. Gallego*, 2 Brock, 286; *Browning v. Headley*, 2 Rob. (Va.) 342; *Durr v. Bowyer*, 2 McCord, Ch. 368; *Helms v. Franciscus*, 2 Bland, 545; *Bell v. Bell*, 1 Kelly, 637; *Howard v. Moffatt*, 2 Johns. Ch. 206; *Glen v. Fisher*, 6 id. 33; *Duvall v. Farmers' Bank*, 4 Gill & J. 283; *Groverman v. Diffenderffer*, 11 id. 15; *Myers v. Myers*, 1 Bail. Eq. 24; *Yeldell v. Quarles*, Dudl. Eq. 56; *Hill v. Hill*, 1 Strob. Eq. 2; *Bennett v. Dillingham*, 2 Dana, 436; *Thomas v. Kennedy*, 4 B. Mon. 235; *Napier v. Howard*, 3 Kelly, 193; *Smith v. Kane*, 2 Paige, 303; *Abernethy v. Abernethy*, 8 Fla. 243; *Haviland v. Bloom*, 6 Johns. Ch. 178. In North Carolina, this equity of the wife to a settlement is not allowed. *Bryan v. Bryan*, 1 Dev. Eq. 47; *Lassiter v. Dawson*, 2 id. 383. In Pennsylvania,

equitable right which a married woman has to a provision out of her own fortune, before her husband reduces it to possession, and it stands upon a peculiar doctrine of courts of equity. (a) The extent of the doctrine cannot be ascertained from any general reasoning. It is the creation of courts of equity, and, to ascertain its extent or its limitations, recourse must be had to the practice of the courts. Whenever the fortune of a married woman is within the jurisdiction of the court, either by having been paid into court or by a suit concerning its possession, the court always directs an inquiry whether a settlement has been made; and the constant habit is to direct a settlement, not only upon the

this equity is enforced in the courts of law, by imposing terms upon the husband's right to recover his wife's *choses in action*. *Rees v. Waters*, 9 Watts, 90.

(a) When a husband is indebted to a testator whose will bequeaths property to his wife, the wife's equity to a settlement is prior to the right of retainer by the executors for the husband's debt. *In re Briant*, *Poulter v. Shackel*, 39 Ch. D. 471, following *Carr v. Taylor*, 10 Ves. 574; *In re Batchelor*, L. R. 16 Eq. 481. In *Pemberton v. Marriott*, 47 L. T. 332, a married woman, having obtained a decree declaring that, subject to a certain inquiry and a certain direction, property should be settled upon her and her infant children, was held entitled to the property absolutely as against her children, her husband having died before the decree was carried into effect. The trustee of a marriage settlement may be heard in opposition to an application to alter such settlement, but not in support thereof. *Corrance v. Corrance*, L. R. 1 P. & D. 495. The wife's heirs are necessary parties to a suit to set aside a married woman's will and to invalidate a marriage settlement in her favor. *McDonnell v. Eaton*, 18 F. R. 710. If a married woman elects to avoid a covenant, her interests in other property under the settlement should be impounded to compensate those who lose by her election. *Hamilton v. Hamilton*, [1892] 1 Ch. 396. See also *Re Queade's Trusts*, 54 L. J. Ch. 786; *Re Wheatley*, 27 Ch. D. 606; *Re Vardon's Trusts*, 28 Ch. D. 124; 31 Ch. D. 275. An infant's settlement of property on her marriage is voidable at her election, as regards her, but not void. *Edwards v. Carter*, [1893] A. C. 360; *Duncan v. Dixon*, 44 Ch. D. 211. A married woman, after obtaining a decree of judicial separation, is a *feme sole* with respect to property which she acquires, or which devolves upon her after such decree. *Waite v. Morland*, 38 Ch. D. 135. See *Re Emery's Trusts*, 50 L. T. 197; *Fitzgerald v. Chapman*, 1 Ch. D. 563.

wife, but upon the children also. The wife cannot say that she claims a settlement for herself, and not for the children. She has the option to have no settlement; but if a settlement is made, it must be upon the wife and children. The wife is examined in open court, whether she wishes a settlement or not; if she does not desire one, the possession of the property is delivered over to her husband.<sup>1</sup>

§ 628. The steps for a settlement must be taken before the husband has obtained the actual possession; for courts will not compel a husband who has possession to refund the property, in order that a settlement may be made,<sup>2</sup> unless such possession was obtained by fraud,<sup>3</sup> or the property came to the husband's hands after suits for its possession or for a settlement had been instituted,<sup>4</sup> or unless the payment to him was in some way wrongful,<sup>5</sup> in which case equity will follow the property and order a settlement; and where a husband had once reduced his wife's property to possession, and afterwards settled it upon her in the hands of a trustee, by an invalid deed of separation, and brought a suit to recover back the possession, the court ordered a settlement.<sup>6</sup> If the husband has the money in hand in another right, as trustee for the wife, a settlement may be ordered.<sup>7</sup>

<sup>1</sup> See cases in last note.

<sup>2</sup> 1 *Rop. Husb. and Wife*, 270; *Carter v. Carter*, 14 Sm. & M. 59; *Carleton v. Banks*, 7 Ala. 34; *Van Duzer v. Van Duzer*, 6 Paige, 368; *Wiles v. Wiles*, 3 Md. 1; *Whitesides v. Dorris*, 7 Dana, 107; *Rees v. Waters*, 9 Watts, 90; *Thomas v. Shepperd*, 2 McCord, Ch. 36; *Van Epps v. Van Deusen*, 4 Paige, 64; *Wickes v. Clarke*, 8 id. 161; *Heath v. Heath*, 2 Hill, Ch. 100; *Perryclear v. Jacobs*, id. 504; *Mitchell v. Sevier*, 9 Humph. 146; *Udell v. Kenney*, 3 Cow. 591; *Dold v. Geiger*, 2 Grat. 98; *State v. Krebs*, 6 Har. & J. 31; *Glaister v. Hewer*, 8 Ves. 205; *Pool v. Morris*, 29 Ga. 374.

<sup>3</sup> *Colmer v. Colmer*, 2 Atk. 98; *Moseley*, 113; *Watkins v. Watkins*, 2 Atk. 96; 2 Spence, Eq. Jur. 488.

<sup>4</sup> *Crook v. Turpin*, 10 B. Mon. 243.

<sup>5</sup> *Wardlaw v. Gray*, 2 Hill, Ch. 651.

<sup>6</sup> *Carter v. Carter*, 14 Sm. & M. 59.

<sup>7</sup> *Barron v. Barron*, 24 Vt. 375; *Gray's Estate*, 1 Penn. St. 329; *Goochenaure's Est.*, 23 id. 460.

§ 629. If a suit is already pending for the possession, or if the property is in court, the wife may intervene by petition.<sup>1</sup> It was for some time thought that a wife could not proceed by original bill; but it is now well established that a wife may bring a bill for a settlement,<sup>2</sup> and that she may have an injunction against her husband from proceeding in the ecclesiastical or probate courts to recover the property.<sup>3</sup> In America, some cases have gone so far as to compel a settlement when the suits to recover the property were in the common-law courts.<sup>4</sup> But the better opinion is, that where a husband, or a creditor or assignee, is pursuing a strictly legal or statutory right in a court of law, a court of equity cannot interfere for the purpose of enforcing a settlement. As where a wife was entitled to a distributive share in an estate, and her husband became a bankrupt, whereby his right to receive his wife's distributive share vested in his assignee, the court held that the assignee had the absolute legal right to collect the wife's distributive share; but inasmuch as the court had equity jurisdiction over the distribution of the assets of the bankrupt, it had jurisdiction to order a settlement upon the wife, before the assignee distributed the assets among the husband's creditors.<sup>5</sup> In cases where the court would have no jurisdiction of the assets, as where a wife's distributive share was trustee for a husband's debt, the court could not interfere.<sup>6</sup>

<sup>1</sup> Greedy v. Lavender, 13 Beav. 62; Scott v. Spashett, 3 Mac. & G. 599.

<sup>2</sup> Elibank v. Montalieu, 5 Ves. 737; Duncombe v. Greenacre, 6 Jur. (N. S.) 987; 7 Jur. (N. S.) 175; 1 Lead. Cas. Eq. 362; 2 Story, Eq. Jur. § 1414; Wiles v. Wiles, 3 Md. 1; Moore v. Moore, 14 B. Mon. 259; Wright v. Arnold, id. 642; Poindexter v. Jeffries, 15 Grat. 363.

<sup>3</sup> Jewson v. Moulson, 2 Atk. 419; Dumond v. Magee, 4 Johns. Ch. 318; Gardner v. Walker, 1 Strange, 503.

<sup>4</sup> Van Epps v. Van Deusen, 4 Paige, 64; Dewall v. Covenhoven, 5 id. 581; Fry v. Fry, 7 id. 461; Corley v. Corley, 22 Ga. 178; Dearn v. Fitzpatrick, Meigs, 551; Martin v. Martin, 1 Hoff. 462.

<sup>5</sup> Davis v. Newton, 6 Met. 537.

<sup>6</sup> Holbrook v. Waters, 19 Pick. 354; Wheeler v. Bowen, 20 Pick. 563; Sturgis v. Champneys, 5 M. & C. 105; Jewson v. Moulson, 2 Atk. 419;

§ 630. A trustee may refuse to pay over the wife's equitable property to her husband, if he thinks there should be a settlement; and the husband and wife and trustee can arrange a settlement for the wife, and by such agreement the trustee can pay the whole or part of the equitable assets into the hands of a trustee under an existing settlement; and such arrangement will be as valid a settlement as if made by order of court.<sup>1</sup> The trustee is always justified in bringing the fund into court, although the wife may desire it to be paid to her husband;<sup>2</sup> for the wife cannot consent out of court that no settlement shall be made if the fund is in court, but she must be examined in open court.<sup>3</sup> If suit is commenced, neither the trustee nor executor, holding the equitable interests of the wife, can pay them over to the husband, until it is finally determined whether a settlement shall be made.<sup>4</sup>

§ 631. In practice courts of equity proceed upon principles of their own, and settle all the property of a ward of the court upon herself, if a man marries her without permission, and thereby commits a contempt of the court. In such cases

*Parsons v. Parsons*, 9 N. H. 309; *Wiles v. Wiles*, 3 Md. 1; *Barron v. Barron*, 24 Vt. 375; *Allen v. Allen*, 6 Ired. Eq. 293.

<sup>1</sup> *Motefiore v. Behrens*, L. R. 1 Eq. 171.

<sup>2</sup> *Re Swan*, 2 Hem. & Mil. 34; *Campbell v. French*, 3 Ves. 323; *Tasburgh's Case*, 1 V. & B. 507; *Minet v. Hyde*, 2 Bro. Ch. 663; *Parsons v. Dunne*, Belt's Supp. Ves. 276. An infant cannot consent. *Stubbs v. Gargan*, 2 Beav. 496; *Abraham v. Newcombe*, 12 Sim. 566, overruling *Gullin v. Gullin*, 7 Sim. 236; *Udall v. Kenney*, 3 Cow. 590; *Phillips v. Hassell*, 10 Humph. 197; *Ex parte Warfield*, 11 Gill & J. 23. Nor can the consent be given until the amount of the fund is known. *Edmunds v. Townshend*, 1 Anst. 93; *Jernegan v. Baxter*, 6 Madd. 32; *Sperling v. Rochfort*, 8 Ves. 180; *Packer v. Packer*, 1 Coll. 92; *Watson v. Marshall*, 17 Beav. 363; *In re Bendyshe*, 3 Jur. (n. s.) 727. But if a married woman stands by and assents to a sale by her husband, she will be estopped to claim a settlement. *Wright v. Arnold*, 14 B. Mon. 638; *Smith v. Atwood*, 14 Ga. 402. The wife cannot consent to the transfer of any interest in reversion or remainder until it becomes possessory. *Socket v. Wray*, 2 Atk. 6, n.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Macauley v. Phillips*, 4 Ves. 18; *Murray v. Elibank*, 10 Ves. 90; *Delagarde v. Lampriere*, 6 Beav. 344; *Crook v. Turpin*, 10 B. Mon. 243.



the husband, and his creditors and assignees, will be restrained from interfering with the property, either at law or in equity.<sup>1</sup> So if a husband has abandoned his wife, or maltreats and abuses her, the court may interfere and settle all the wife's *choses in action*, not reduced to possession, upon her for her support; although no suit is pending concerning it, and it is not in court, and although it may not even be within the jurisdiction of the court.<sup>2</sup> It is said further, that if the husband is entirely insolvent, and the wife is without means of support, she may maintain a bill against him, and his creditors and assignees, to restrain them from getting possession of her *choses in action* in a suit at law, until she can obtain an adequate provision for herself out of her property.<sup>3</sup> The court can give relief if the parties are within its jurisdiction, although the property may be in another jurisdiction.<sup>4</sup>

§ 632. This equity of a settlement may be enforced against the husband, and all persons claiming under him, as his assignees in bankruptcy, or under a general assignment for creditors.<sup>5</sup> Even if the husband makes an assignment for a

<sup>1</sup> *Eyre v. Shaftsbury*, 2 P. Wms. 108, 121, 124; *Kenney v. Udall*, 5 Johns. Ch. 464; 3 Cow. 591; *Van Duzer v. Van Duzer*, 6 Paige, 366; *Helms v. Franciscus*, 2 Bland, 545; *Chambers v. Perry*, 17 Ala. 726; *Van Epps v. Van Deusen*, 4 Paige, 65; *Layton v. Layton*, 1 Sm. & Gif. 179.

<sup>2</sup> *Ibid.*; *Renwick v. Renwick*, 10 Paige, 421; *Martin v. Martin*, 1 Hoff. 462; *Haviland v. Myers*, 6 Johns. Ch. 25, 178; *Rees v. Waters*, 9 Watts, 90.

<sup>3</sup> *Ibid.*; *Bell v. Bell*, 1 Kelly, 627; *Guild v. Guild*, 16 Ala. 122.

<sup>4</sup> *Guild v. Guild*, 16 Ala. 122.

<sup>5</sup> *Jewson v. Moulson*, 2 Atk. 420; *Burdon v. Dean*, 2 Ves. Jr. 607; *Oswell v. Probert*, *id.* 680; *Pryor v. Hill*, 4 Bro. Ch. 138; *Sturgis v. Champneys*, 5 Myl. & Cr. 97; *Gassett v. Grout*, 4 Met. 486; *Davis v. Newton*, 6 Met. 537; *Page v. Estes*, 19 Pick. 269; *Kenney v. Udall*, 5 Johns. Ch. 464; 3 Cow. 591; *Haviland v. Myers*, 6 Johns. Ch. 25; *Mumford v. Murray*, 1 Paige, 620; *Van Epps v. Van Deusen*, 4 *id.* 65; *Phillips v. Hassell*, 10 Humph. 197; *Bennett v. Dillingham*, 2 Dana, 436; *Moore v. Moore*, 14 B. Mon. 259; *Elliott v. Waring*, 5 *id.* 338; *Thomas v. Kennedy*, 4 *id.* 235; *Bowling v. Winslow*, 5 *id.* 29; *Hord*

valuable consideration, the equity of the wife will prevail over it.<sup>1</sup> The wife's equity is paramount to all rights of set-off against the husband.<sup>2</sup>

§ 633. The wife's right to a settlement extends to all her property, legal or equitable, where it is necessary for her husband, or those claiming under him, to come into court for its recovery;<sup>3</sup> and to all her interests, whether absolute and in fee, or for life,<sup>4</sup> or whether legal or equitable;<sup>5</sup> or to a trust for a term,<sup>6</sup> or to the estate of the wife as tenant in tail in possession,<sup>7</sup> or to the wife's interest as a mortgagee,<sup>8</sup>

*v. Hord*, id. 81; *Athey v. Knotts*, 6 B. Mon. 24; *Bowling v. Bowling*, id. 31; *Bell v. Bell*, 1 Kelly, 637; *Napier v. Howard*, id. 193; *Andrew v. Jones*, 10 Ala. 401; *Browning v. Headley*, 2 Rob. (Va.) 342; *Sherrard v. Carlisle*, 1 Pat. & Heath, 12; *Durr v. Bowyer*, 2 McCord, Ch. 368; *Heath v. Heath*, 2 Hill, Ch. 100; *Perryclear v. Jacobs*, id. 504; *Riley*, Ch. 47; *Duvall v. Farmers' Bank*, 4 Gill & J. 283; *State v. Reigart*, 1 Gill, 3; *Dunkley v. Dunkley*, 2 De G., M. & G. 390; *Napier v. Napier*, 1 Dr. & W. 410; *Crook v. Turpin*, 10 B. Mon. 244; *Ball v. Montgomery*, 4 Bro. Ch. 338; *Brown v. Clarke*, 3 Ves. 166; *Freeman v. Parsley*, id. 421.

<sup>1</sup> *Macauley v. Phillips*, 4 Ves. 19; *Scott v. Spashett*, 3 Mac. & G. 599; *Marshal v. Gibbings*, 4 Ir. Ch. 276.

<sup>2</sup> *Hall v. Hill*, 1 Dr. & W. 109; *Carr v. Taylor*, 10 Ves. 574; *Ex parte Blagden*, 2 Rose, 294; *Ex parte O'Farrall*, 1 G. & J. 347; *McMahon v. Burchall*, 3 Hare, 97; 5 id. 335; *Reeve v. Rocher*, 1 De G. & Sm. 626; *Lee v. Egremont*, 5 De G. & Sm. 348; *McCormick v. Garnett*, 2 Sm. & Gif. 37.

<sup>3</sup> *Milner v. Colmer*, 2 P. Wms. 639; *Bosvil v. Brander*, 1 id. 458; *Sturgis v. Champneys*, 5 Myl. & Cr. 97; *Oswell v. Probert*, 2 Ves. Jr. 680; *Brown v. Clarke*, 3 Ves. 166; *Freeman v. Parsley*, id. 421; *Mitford v. Mitford*, 9 Ves. 87.

<sup>4</sup> *Ibid.*; *Burdon v. Dean*, 2 Ves. Jr. 607; *Ball v. Montgomery*, 4 Bro. Ch. 338; *Wright v. Morley*, 11 Ves. 12; *Pryor v. Hill*, 4 Bro. Ch. 139.

<sup>5</sup> *Ibid.*; *Wortham v. Pemberton*, 1 De G. & Sm. 644.

<sup>6</sup> *Macauley v. Phillips*, 4 Ves. 19; *Turner's Case*, 1 Ch. Cas. 307; 1 Vern. 7; *Sanders v. Page*, 3 Ch. R. 223; *Hanson v. Keating*, 4 Hare, 1; *Pitt v. Hunt*, 1 Vern. 18; *Jewson v. Moulson*, 2 Atk. 417; *Wortham v. Pemberton*, 1 De G. & Sm. 644; *Durham v. Crackles*, 8 Jur. (N. S.) 1174; *Gleaves v. Paine*, 1 De G., J. & Sm. 87; *Smith v. Matthews*, 3 De G., F. & J. 139.

<sup>7</sup> *Wortham v. Pemberton*, 1 De G. & Sm. 644.

<sup>8</sup> *Ibid.*; *Bates v. Dandy*, 2 Atk. 207; *Packer v. Wyndham*, Pr. Ch. 418;

or to an equity of redemption,<sup>1</sup> or to her interests in chattels real, whether legal or equitable,<sup>2</sup> or to her contingent interests.<sup>3</sup> She is also entitled to a settlement in estates that come to her after marriage, as well as before.<sup>4</sup> But she cannot have a settlement out of her interests in remainder or in reversion, until they fall into possession or become possessory.<sup>5</sup> The amount of the property is not mate-

*Walter v. Saunders*, 1 Eq. Cas. Ab. 58; *Inclendon v. Northcote*, 3 Atk. 335; *Mitford v. Mitford*, 9 Ves. 99; *Hore v. Becher*, 12 Sim. 465; *Jones v. Gibbons*, 9 Ves. 407; *Rees v. Keith*, 11 Sim. 338; *Duncombe v. Greenacre*, 6 Jur. (N. S.) 987; 7 Jur. (N. S.) 178.

<sup>1</sup> *Clark v. Cook*, 3 De G. & Sm. 333; *Hatchell v. Eggleso*, 1 Ir. Ch. 215; *Hill v. Edmonds*, 5 De G. & Sm. 603.

<sup>2</sup> *Roupe v. Atkinson*, Bunb. 162; *Mitford v. Mitford*, 9 Ves. 99; *Packer v. Wyndham*, Pr. Ch. 418; *Franco v. Franco*, 4 Ves. 528; *Bullock v. Knight*, 1 Ch. Ca. 266; *Sanders v. Page*, 3 Ch. R. 223; *Macauley v. Phillips*, 4 Ves. 19; *Wike's Case*, Lane, 54; *Roll. Ab.* 343; *Jewson v. Moulson*, 2 Atk. 421; *Inclendon v. Northcote*, 3 id. 435; *Clark v. Burgh*, 2 Coll. 221; *Sturgis v. Champneys*, 5 Myl. & Cr. 97; *Duberly v. Day*, 16 Beav. 33; *Hanson v. Keating*, 4 Hare, 1; *Wortham v. Pemberton*, 1 De G. & Sm. 644; *Robertson v. Norris*, 11 Q. B. 916.

<sup>3</sup> *Donne v. Hart*, 2 R. & M. 360.

<sup>4</sup> *Barrow v. Barrow*, 18 Beav. 529.

<sup>5</sup> *Socket v. Wray*, 2 Atk. 6, n.; *Frazer v. Bailie*, 1 Bro. Ch. 518; *Richards v. Chambers*, 10 Ves. 580; *Woollands v. Crowcher*, 12 Ves. 175; *Ritchie v. Broadbent*, 2 J. & W. 456; *Packard v. Roberts*, 3 Madd. 384; *Whittle v. Henning*, 2 Phil. 731; *Greedy v. Lavender*, 13 Beav. 62; *Osborn v. Morgan*, 9 Hare, 432; 8 Eng. L. & Eq. 192; *Taylor v. Austen*, 9 Dr. 459; *Marshall v. Fowler*, 15 Eng. L. & Eq. 430; *Duberly v. Day*, 16 Beav. 33; *Cunningham v. Antrobus*, 16 Sim. 436; *Brandon v. Woodthorpe*, 10 Beav. 463; *Rogers v. Acaster*, 14 Beav. 445, overruling *Hall v. Hugonin*, 14 Sim. 595; *Browning v. Headley*, 2 Rob. (Va.) 340; *Moore v. Thornton*, 7 Grat. 99; *Terry v. Brunson*, 1 Rich. Eq. 78; *Reese v. Holmes*, 5 id. 531; *Sale v. Saunders*, 24 Miss. 24; *Goodwin v. Moore*, 4 Humph. 221; *Caplinger v. Sullivan*, 2 Humph. 548. In Pennsylvania, Kentucky, and North Carolina, however, the English rule is not followed; but a husband may assign and convey vested remainders and reversions to his wife. *Knight v. Leak*, 2 Dev. & Bat. 133; *Howell v. Howell*, 3 Ired. Eq. 528; *Weeks v. Weeks*, 5 id. 111; *Merriweather v. Booker*, 5 Litt. 251; *Davenport v. Prewett*, 9 B. Mon. 95; *Jackson v. Sublett*, 10 id. 469; *Turner v. Davis*, 1 id. 151; *Siter's Case*, 4 Rawle, 461; *Smilie's Est.*, 22 Penn. St. 130; *Woelper's App.*, 2 id. 71; *Webb's App.*, 21 id. 248. And see *Scott v. James*, 3 How. (Miss.) 307.

rial,<sup>1</sup> though it was once said that the court would not make a settlement of property of less value than £200.<sup>2</sup> Nor will her living separate from her husband defeat her right to a settlement.<sup>3</sup>

§ 634. If a husband is solvent, and is living with his wife and maintaining her as well as he can, he is entitled to the income of her *life-estates*, and no settlement can be made.<sup>4</sup> If, however, he deserts her, or she is divorced for his misconduct, she may receive the whole or a part of the income of her *life-estates* for her support.<sup>5</sup> So if the husband is a bankrupt, and the wife is without means, the court will enforce a settlement out of the income of a *life-estate* as against the assignee.<sup>6</sup> If a husband, while living with and maintaining his wife, assigns the income of her *life-estates* for a valuable consideration, she can have no settlement, as the assignment may have been made to enable him to support her.<sup>7</sup> But a fraudulent conveyance will not defeat her

<sup>1</sup> *In re Kincaid's Trusts*, 17 Eng. L. & Eq. 396; 1 Dr. 326; *Cutler's Trusts*, 14 Beav. 224; *Re Morriman's Trust*, 10 Weekly Rep. 334; *Roberts v. Collett*, 6 Sm. & Gif. 138.

<sup>2</sup> *Foden v. Finney*, 4 Russ. 428; *March v. Head*, 3 Atk. 721; *Bourdillon v. Adair*, 3 Bro. Ch. 237; *Elworthy v. Wickstead*, 1 J. & W. 69.

<sup>3</sup> *Eedes v. Eedes*, 11 Sim. 569; *Greedy v. Lavender*, 13 Beav. 62; *Carter v. Carter*, 14 Sm. & M. 59. But see *Carr v. Estabrooke*, 4 Ves. 146; *Ball v. Montgomery*, 2 Ves. Jr. 191; *Watkyns v. Watkyns*, 2 Atk. 97; *In re Lewin's Trusts*, 20 Beav. 378; *Ball v. Coutts*, 1 V. & B. 302; *In re Walker*, Ll. & Goo. Sugd. 299.

<sup>4</sup> *Bullock v. Menzies*, 4 Ves. 798; *Re Duffy's Trust*, 28 Beav. 386; *Vaughan v. Buck*, 13 Sim. 404.

<sup>5</sup> *Barrow v. Barrow*, 5 De G., M. & G. 782; *Tidd v. Lister*, 3 id. 870; *Wright v. Morley*, 11 Ves. 12; *Allerton v. Knowell*, 4 Ves. 799; *Oxenden v. Oxenden*, 2 Vern. 493; *Williams v. Callow*, 2 Vern. 572; *Atherton v. Mowell*, 1 Cox, 229; *Eedes v. Eedes*, 11 Sim. 569.

<sup>6</sup> *Vaughan v. Buck*, 1 Sim. (N. S.) 284; *Squires v. Ashford*, 23 Beav. 132; *Barnes v. Robinson*, 1 N. R. 257; *Elliott v. Cordell*, 5 Madd. 149; *Lumb v. Milnes*, 5 Ves. 517; *Brown v. Clarke*, 3 Ves. 166; *Jacobs v. Amyatt*, 1 Madd. 376, n.; *Sturgis v. Champneys*, 5 Myl. & Cr. 97; *Gilchrist v. Cator*, 1 De G. & Sm. 188; *Koeber v. Sturges*, 22 Beav. 588.

<sup>7</sup> *Tidd v. Lister*, 10 Hare, 140; 3 De G., M. & G. 857; *Duffy's Trust*, 28 Beav. 386.

right.<sup>1</sup> If the wife already has an adequate provision, a settlement will not be made out of her *life-estate*;<sup>2</sup> nor will it be made if she is living in adultery,<sup>3</sup> or refuses to accompany her husband when he removes from place to place, in the performance of the duties of his profession or occupation.<sup>4</sup> If she fraudulently induce a purchaser to advance his money upon a purchase of her interests, a settlement will not be made.<sup>5</sup>

§ 635. If, however, a husband has already made a settlement upon his wife, he will not be required to make another on coming into court to reduce her property to possession.<sup>6</sup> A settlement, however, will apply *prima facie* only to the property then belonging to the wife, unless by the terms of the instrument it embraces her subsequently acquired property.<sup>7</sup> The court may, however, in particular circumstances decline to interfere with marital rights.<sup>8</sup> If in terms it does not embrace subsequent property, he will be required to make an additional settlement.<sup>9</sup> If a settlement in terms states that it is in consideration of his wife's fortune, it will entitle him to her present fortune, however inadequate the settlement may be, if made before marriage;<sup>10</sup> but if it is inade-

<sup>1</sup> Colmer v. Colmer, Mose. 113.

<sup>2</sup> Aguilar v. Aguilar, 5 Madd. 414.

<sup>3</sup> Ball v. Montgomery, 2 Ves. Jr. 191; Duncan v. Campbell, 12 Sim. 616; Alexander v. McCulloch, 2 Ves. Jr. 192.

<sup>4</sup> Bullock v. Menzies, 4 Ves. 798.

<sup>5</sup> Lush's Trusts, L. R. 4 Eq. 591; Sharpe v. Toy, id. 35.

<sup>6</sup> Druce v. Denison, 6 Ves. 395; Carr v. Taylor, 10 Ves. 579; Garforth v. Bradley, 2 Ves. 677; Mitford v. Mitford, 9 Ves. 96; Martin v. Martin, 1 Comst. 473.

<sup>7</sup> Ibid.; Barrow v. Barrow, 5 De G., M. & G. 782; 18 Beav. 529; Matter of Beresford, 1 Des. 263. The fact that a woman lives separate from her husband will not entitle her to an additional settlement, if the first settlement in terms embraced her future fortune. *Re Erskine's Trusts*, 1 K. & J. 302.

<sup>8</sup> Giacometti v. Prodgers, L. R. 14 Eq. 253.

<sup>9</sup> Ibid.; Spirrett v. Willows, 3 De G., J. & S. 293; L. R. 1 Ch. 520.

<sup>10</sup> Lanoy v. Athol, 2 Atk. 448; 3 P. Wms. 199, n.; Adams v. Cole, 2 Atk. 449, n.; Forr. 168; Brett v. Forcer, 3 Atk. 405.

quate, it will be an additional reason for requiring another settlement, upon the accession of additional property to her.<sup>1</sup> But even an adequate settlement, made after marriage, will not bar her equity to an additional settlement.<sup>2</sup> It is not important that the settlement should refer to the present fortune of the wife: it will be presumed to embrace it.<sup>3</sup> If the settlement is made in consideration of a part of the wife's equitable property, it will not be extended beyond its express terms.<sup>4</sup> By these settlements the husband becomes the purchaser of so much of the wife's property as they embrace; but they simply give him the power to reduce the equitable and legal *choses in action* to possession: if he dies without doing so, she takes them by survivorship.<sup>5</sup>

§ 636. The amount that will be settled upon the wife is subject to the sound discretion of the court, acting upon all the circumstances, such as the solvency or insolvency of the husband, the amount of the wife's property he has already received, the amount that remains, their position in society, and the fact whether a settlement has already been made upon the wife, the conduct of the husband, and whether he lives with her and maintains her as well as he can. There is no general rule. In some cases one-half the property has been settled on her, and the other half allowed to go to his assignees. In other cases, and especially where there has been misconduct on the part of the husband, the whole sum has been settled; and the court will be inclined to do this, if the husband has already expended a large part of his wife's fortune, or if the sum remaining is barely sufficient to sup-

<sup>1</sup> *March v. Head*, 3 Atk. 720; *Tomkyns v. Ladbroke*, 2 Ves. 595; *Stackpole v. Beaumont*, 3 Ves. Jr. 98; *Elibank v. Montolieu*, 5 Ves. 737.

<sup>2</sup> *Dunkley v. Dunkley*, 2 De G., M. & G. 390; *Matter of Beresford*, 1 Des. 263.

<sup>3</sup> *Blois v. Hereford*, 2 Vern. 502; and see *Salway v. Salway*, Amb. 602.

<sup>4</sup> *Cleland v. Cleland*, Pr. Ch. 63; *Burdon v. Dean*, 2 Ves. Jr. 607.

<sup>5</sup> *Rudyard v. Neirin*, Pr. Ch. 209; *Lister v. Lister*, 2 Vern. 68; *Mitford v. Mitford*, 9 Ves. 96; *Salway v. Salway*, Amb. 692; *Heaton v. Hassell*, 4 Vin. Ab. 40.

port the wife and children,<sup>1</sup> or if the husband has married a ward of the court without permission.<sup>2</sup>

§ 637. If a husband refuses to make a settlement upon his wife, the court will give him no aid in reducing her *choses in action*, whether legal or equitable, to possession; and the court will retain the capital, if within its jurisdiction, so that the wife may take the same by survivorship. But his marital rights will not be otherwise taken away, and he will be allowed to receive the income, so long as he lives with and maintains her.<sup>3</sup> Where, however, a husband has deserted his wife and left her unprovided for;<sup>4</sup> or where he has

<sup>1</sup> *Jewson v. Moulson*, 2 Atk. 423; *Worrall v. Marlar*, 1 Cox, 153; 1 Dick. 647; *Brown v. Clarke*, 3 Ves. 166; *Bagshaw v. Winter*, 5 De G. & Sm. 466; *Dunkley v. Dunkley*, 2 De G., M. & G. 396; *Green v. Otte*, 1 S. & S. 250; *Napier v. Napier*, 1 Dr. & W. 407; *Aubrey v. Brown*, 4 W. Rob. 425; *Coster v. Coster*, 9 Sim. 597; *Ex parte Pugh*, 1 Dr. 202; *Vaughan v. Buck*, 1 Sim. (N. S.) 284; *Beresford v. Hobson*, 1 Madd. 362; *Jacobs v. Amyatt*, id. 376; *Brett v. Greenwell*, 3 Y. & Col. Ex. 230; *Gardner v. Marshall*, 14 Sim. 575; *Francis v. Brooking*, 19 Beav. 347; *Scott v. Spashett*, 3 Mac. & G. 599; *Marshall v. Fowler*, 16 Beav. 249; *Re Kincaid's Trusts*, 1 Dr. 326; *In re Cutler*, 14 Beav. 220; *Gent v. Harris*, 10 Hare, 383; *Layton v. Layton*, 1 Sm. & Gif. 179; *Walker v. Drury*, 17 Beav. 482; *Helms v. Franciscus*, 2 Bland, 545; *Kenney v. Udell*, 5 Johns. Ch. 464; 3 Cow. 591; *Napier v. Howard*, 3 Kelly, 205; *Bowling v. Winslow*, 5 B. Mon. 31; *Browning v. Headley*, 2 Rob. (Va.) 340; *Hall v. Hall*, Md. Ch. 283; *McVey v. Boggs*, 3 Md. Ch. 94; *Barron v. Barron*, 24 Vt. 375; *Bennett v. Oliver*, 7 Gill & J. 191.

<sup>2</sup> *Ante*, § 631; *Stackpole v. Beaumont*, 3 Ves. Jr. 89; *Stevens v. Savage*, 1 id. 154; *Chassaing v. Parsonage*, 5 Ves. 15; *Millett v. Rowse*, 7 Ves. 419; *Bathurst v. Murray*, 8 Ves. 74; *Wells v. Price*, 5 Ves. 398; *Winch v. James*, 4 Ves. 386; *Priestly v. Lamb*, 6 Ves. 421; *Hallet v. Halsey*, 9 Ves. 471; *Pearce v. Crutchfield*, 14 Ves. 206; *In re Healey*, 1 C. & L. 393; *In re Walker*, Ll. & Goo. Sugd. 325; *Hodgens v. Hodgins*, 11 Bligh (N. S.) 52; 4 C. & F. 323; *Birkett v. Hibbert*, 3 Myl. & Cr. 227; *Like v. Beresford*, 3 Ves. 506; *Ball v. Coutts*, 1 V. & B. 305. See *Bennett v. Biddles*, 10 Jur. 534.

<sup>3</sup> *Sleech v. Thorington*, 2 Ves. 562; *Oxenden v. Oxenden*, id. 493; *Williams v. Callow*, 2 Vern. 751; *Atcheson v. Atcheson*, 11 Beav. 485; *Att. Gen. v. Bacchus*, 9 Price, 30; 11 Price, 547; *Grute v. Locroft*, Cro. Eliz. 287.

<sup>4</sup> *Ibid.*; *Watkyns v. Watkyns*, 2 Atk. 96; *Peters v. Grote*, 7 Sim. 238; *Rishton v. Cobb*, 9 Sim. 620.

received a large part of her fortune, and refuses to make any settlement;<sup>1</sup> or where he is a lunatic,<sup>2</sup> and incapable of taking care of her; or where he is a bankrupt or totally insolvent,<sup>3</sup>—the court will order the income to be paid to her.

§ 638. The right to a settlement and the survivorship of the wife are two different things; although they both depend upon the fact whether the husband has reduced the wife's *choses in action* to possession. A settlement is ordered by the court for the present benefit of the wife, where the husband has not actually received the property. Survivorship of the wife is her right to her *choses in action* at the death of her husband, in case he has not already reduced them to possession: the one is the act of the court; the other is operation of law.

§ 639. It frequently becomes a question whether a wife's *choses in action*, legal or equitable, have been so dealt with by her husband as to be reduced to his legal possession, in such manner as to bar her right to a settlement, or to destroy her right of survivorship in the property in case he dies. There is no difference in the rule between legal and equitable property.<sup>4</sup> If the husband has not done some act to vest the legal property in himself, the wife can claim a settlement, or will take it as survivor.<sup>5</sup> An actual payment or delivery

<sup>1</sup> Bond *v.* Simmonds, 3 Atk. 21.

<sup>2</sup> Stead *v.* Culley, 2 M. & K. 52.

<sup>3</sup> *Ante*, §§ 634–636.

<sup>4</sup> Twisden *v.* Wise, 1 Vern. 161; Hornsby *v.* Lee, 2 Madd. 16; Purdew *v.* Jackson, 1 Russ. 1; Honner *v.* Morton, 3 id. 65.

<sup>5</sup> Pike *v.* Collins, 33 Maine, 43; Parsons *v.* Parsons, 9 N. H. 309; Poor *v.* Hazleton, 15 N. H. 568; Legg *v.* Legg, 8 Mass. 99; Stanwood *v.* Stanwood, 17 Mass. 57; Hayward *v.* Hayward, 20 Pick. 517; Dunn *v.* Sargeant, 101 Mass. 336; Schuyler *v.* Hoyle, 5 Johns. Ch. 196; Searing *v.* Searing, 9 Paige, 283; Snowhill *v.* Snowhill, 1 Green, Ch. 30; Dare *v.* Allen, id. 419; Krumbaar *v.* Burt, 2 Wash. C. C. 406; Lodge *v.* Hamilton, 2 S. & R. 491; Bohn *v.* Headly, 7 H. & J. 257; Browning *v.* Headley, 2 Rob. (Va.) 340; Revel *v.* Revel, 2 Dev. & B. 272; Pickett *v.* Everett, 11 Mo. 568; Clarke *v.* McCreary, 12 Sm. & M. 347; Rice *v.* Thompson, 14 B. Mon. 379; Killar *v.* Beclor, 5 B. Mon. 573; Whitehurst *v.* Harker,



by the legal holder to the husband himself, or to his assignee, or other person appointed or authorized to receive the fund, will be a reduction to possession;<sup>1</sup> but if the assignee has not actually received the property, there is no possession that affects the rights of the wife.<sup>2</sup> The husband must, in all cases, do some *act* to reduce the wife's *choses* to possession. The mere manual possession of them as an administrator, executor, or trustee will not be enough, unless accompanied by some act manifesting an intention to make them his own,<sup>3</sup> as if he charges a legacy as paid to him, and the account is allowed,<sup>4</sup> or if he expends the money in his own business,<sup>5</sup> or sells the property, or takes notes in his own name.<sup>6</sup> A mere suit in the name of himself and wife is not a reduction to possession,<sup>7</sup> nor is a bill in equity for a divi-

2 Ired. Eq. 292; *Poindexter v. Blackburn*, 1 Ired. Eq. 286; *Terry v. Brunson*, 1 Rich. Eq. 78; *Sayre v. Flournoy*, 3 Kelly, 541; *Bibb v. McKinley*, 9 Port. 636. *Choses in action* in Connecticut, accruing to a wife during coverture, vest immediately in the husband, and do not survive to the wife if the husband dies, even though he has done nothing to reduce them to possession, *Griswold v. Penniman*, 2 Conn. 564; although this is not altered by statute. *Edwards v. Sheridan*, 24 Conn. 165; *Jennings v. Davis*, 31 Conn. 134; *Blount v. Bestland*, 5 Ves. 515; *Macauley v. Phillips*, 4 Ves. 17; *Fort v. Fort*. Forrest, 171.

<sup>1</sup> *Ryland v. Smith*, 1 Myl. & Cr. 53; *Glaister v. Hewer*, 8 Ves. 207; *Johnson v. Johnson*, 1 J. & W. 472; *Hanson v. Miller*, 8 Jur. 209.

<sup>2</sup> *Ibid.*; *Browning v. Headley*, 2 Rob. (Va.) 340; *Mathews v. Guess*, 2 Hill, Eq. 63; *George v. Goldsby*, 23 Ala. 333; *Arrington v. Yarborough*, 1 Jones, Eq. 72; *Bugg v. Franklin*, 4 Sneed, 129; *Lynn v. Bradley*, 1 Met. (Ky.) 232; *Smith v. Atwood*, 13 Ga. 420; *State v. Robertson*, 5 Harrington, 201; *Needles v. Needles*, 7 Ohio St. 432; *Ryan v. Spruill*, 4 Jones, Eq. 27.

<sup>3</sup> *Wallace v. Taliaferro*, 2 Call, 376; *Mayfield v. Clifton*, 3 Stew. 375; *Elms v. Hughes*, 3 Des. 155; *Ross v. Morton*, 10 Yerg. 190; *Kintzinger's Est.*, 2 Ashm. 455; *Miller's Est.*, id. 223; *Gochenaur's Est.*, 23 Penn. St. 460.

<sup>4</sup> *Pierce v. Thompson*, 17 Pick. 391.

<sup>5</sup> *Ellis v. Baldwin*, 1 Watts & S. 253.

<sup>6</sup> *Wardlaw v. Gray*, 2 Hill, Eq. 644.

<sup>7</sup> *Pike v. Collins*, 33 Maine, 43; *Thompson v. Ellsworth*, 1 Barb. Ch. 624; *Arnold v. Ruggles*, 1 R. I. 165; *Bell v. Bell*, 1 Kelly, 637; *Knight v. Brawneer*, 14 Md. 1; *Hall v. McLain*, 11 Humph. 425; 3 Sneed, 536; *Pierce v. Thornley*, 2 Sim. 167.

sion,<sup>1</sup> nor a suit for a distribution;<sup>2</sup> nor is a judgment or decree in such joint suits enough.<sup>3</sup> There must be an execution, and the actual delivery of the property to the husband or his agent.<sup>4</sup> A joint receipt is not sufficient;<sup>5</sup> so a joint recognizance for a wife's legacy is not enough.<sup>6</sup> Mere possession of notes, bonds, and mortgages is not enough;<sup>7</sup> if the money is received by virtue of agreements inconsistent with his receiving it in his *marital* right, the rights of the wife will not be barred.<sup>8</sup> Where a husband sold his wife's *choses in action*, and invested the proceeds in other securities, which he enclosed in an envelope and marked as his own to dispose of, it was held to be a perfect reduction to possession.<sup>9</sup> Where the *act* depends upon the husband's intention at the time, it may be shown, by his declarations and other circumstances, that it was not his intention to reduce the property to possession.<sup>10</sup> If, however, the husband wishes to qualify his acts, and show that he did not reduce the *choses*

<sup>1</sup> Gregory v. Marks, 1 Rand. 355.

<sup>2</sup> Bennett v. Dillingham, 2 Dana, 436; Short v. Moore, 10 Vt. 446; Probate Court v. Niles, 32 Vt. 775; Lewis v. Price, 3 Rich. Eq. 172.

<sup>3</sup> Pike v. Collins, 33 Maine, 43; Mason v. McNeill, 23 Ala. 201; Nanney v. Martin, 1 Eq. Cas. Ab. 68; 3 Atk. 726; Forbes v. Phillips, 1 Ed. 502; Nightingale v. Lockman, Fitzgib. 148; Hore v. Wouffe, 2 B. & B. 424; Adams v. Lavender, 1 McCl. & Y. 41; Re Jenkins, 5 Russ. 183.

<sup>4</sup> Ibid.; Alexander v. Crittenden, 4 Allen, 342.

<sup>5</sup> McDowell v. Potter, 8 Penn. St. 191; Timbers v. Katz, 6 Watts & S. 290.

<sup>6</sup> Lodge v. Hamilton, 2 S. & R. 491; Hake v. Fink, 9 Watts, 336.

<sup>7</sup> Hunter v. Hallett, 1 Edw. Ch. 383; Pickett v. Everett, 11 Mo. 568; Miller's Est., 1 Ashm. 330; Barber v. Slade, 30 Vt. 191; Hall v. Young, 37 N. H. 131; Barron v. Barron, 24 Vt. 375; Holmes v. Holmes, 28 Vt. 765.

<sup>8</sup> Barron v. Barron, 24 Vt. 375; Durant v. Lalley, 3 Strob. 159; Rogers v. Bumpass, 4 Ired. Eq. 385; Savage v. Benham, 17 Ala. 120; Davis v. Davis, 46 Penn. St. 362; Wall v. Tomlinson, 16 Ves. 413; Ryland v. Smith, 1 Myl. & Cr. 53; Burnham v. Bennett, 2 Col. C. C. 254; Baker v. Hall, 12 Ves. 497.

<sup>9</sup> Dunn v. Sargeant, 101 Mass. 336.

<sup>10</sup> Hind's Est., 5 Whart. 138; Gray's Est., 1 Barr, 327; Gochenaur's Est., 23 Penn. St. 460; McDowell v. Potter, 8 id. 191.

to possession, the evidence must be demonstrative.<sup>1</sup> If the *choses* are once reduced to possession, no words of the husband can revive the rights of the wife or defeat the rights of creditors.<sup>2</sup>

§ 640. The receipt of interest by the husband due on a mortgage, bond, or note to the wife, is the reduction of the money received, but it is not a reduction of the principal sum due;<sup>3</sup> nor is the collection of dividends on stocks a reduction of the stocks. To reduce the stocks themselves to possession, they must be transferred into the name of the husband.<sup>4</sup> Part payment of the principal of a note to the husband is not a reduction to possession of the remainder due.<sup>5</sup> A note payable to a married woman may be indorsed and transferred by the husband, and the signature of the wife is not necessary. Such indorsement and transfer of a negotiable instrument is a reduction to possession by the husband.<sup>6</sup> An agreement to sell the *chose* is not a reduction;<sup>7</sup> nor is the set-off of the *chose* against the husband's debt, no money being paid or receipts given;<sup>8</sup> nor is a pledge

<sup>1</sup> Gray's Estate, 1 Penn. St. 327; Gochenaur's Estate, 23 id. 460.

<sup>2</sup> Nolen's App., 23 Pa. St. 35.

<sup>3</sup> Howman v. Corrie, 2 Vern. 190; Hart v. Stephens, 6 Q. B. 937; Stanwood v. Stanwood, 17 Mass. 57; Burr v. Sherwood, 3 Brad. Sur. 85.

<sup>4</sup> Arnold v. Ruggles, 1 R. I. 165.

<sup>5</sup> Nash v. Nash, 2 Madd. 133; Schuyler v. Hoyle, 5 Johns. Ch. 196.

<sup>6</sup> Scarpellini v. Acheson, 7 Q. B. 864; Gatens v. Madderly, 6 M. & W. 428; McNeillage v. Holloway, 1 B. & Ald. 218; Sherrington v. Yates, 12 M. & W. 855; Mason v. Morgan, 2 Ad. & El. 30; Evans v. Secrest, 3 Ind. 545; Wall v. Tomlinson, 16 Ves. 413; Hemmingway v. Mathews, 10 Tex. 207; Tryon v. Sutton, 13 Cal. 490; Wildman v. Wildman, 9 Ves. 174; Twisden v. Wise, 1 Vern. 161; Ryland v. Smith, 1 Myl. & Cr. 53; Stevens v. Beals, 10 Cush. 291; Garforth v. Bradey, 2 Ves. Sr. 675; Richards v. Richards, 2 B. & Ad. 447; Hart v. Stephens, 6 Q. B. 937; Allen v. Wilkins, 8 Allen, 322.

<sup>7</sup> Harwood v. Fisher, 1 Y. & Coll. Ex. 110.

<sup>8</sup> Harrison v. Andrews, 13 Sim. 595; Carr v. Taylor, 10 Ves. 574. A debt due to an estate by a husband may be set off against a legacy to his wife from the same estate. Yoke v. Barnet, 1 Binn. 358; Flory v. Becker, 2 Penn. St. 471. But not after his death. Kreider v. Boyer, 10 Watts, 58; Stout v. Levan, 3 Penn. St. 235.

or assignment of it as collateral security.<sup>1</sup> If a wife's real estate is sold, and notes are taken in the name of the husband, they become his; or if notes are taken in the name of the wife, the husband may collect them and reduce them to possession.<sup>2</sup> The money due on a mortgage to the wife may be received by the husband, and a court of equity will compel her to discharge it, if he dies.<sup>3</sup> The reduction must be complete before the husband's death; mere initiatory steps, which have not resulted in the actual receipt of the money by the husband or his agents, will not be sufficient.<sup>4</sup> And although his debt due to an estate in which his wife has a legacy may be set off against the legacy during his life,<sup>5</sup> it cannot be after his death;<sup>6</sup> nor can the legacy be applied to the debt of the husband due to a third person.<sup>7</sup>

§ 641. In some of the United States, the transfer, assignment, or release of a *chose in action*, in which the wife has a present interest, is such an act of ownership, on the part of the husband, that it will bar the right of survivorship in the wife, although the assignee may not have reduced the *chose* to actual possession.<sup>8</sup> In some States, the wife's *choses*

<sup>1</sup> Latourette v. Williams, 1 Barb. 9; Hartman v. Dowdel, 1 Rawle, 279; Siter's Case, 4 id. 468; Titt v. Colwell, 31 Penn. St. 228.

<sup>2</sup> Taggart v. Boldin, 10 Md. 104; McCrory v. Foster, 1 Iowa, 271; Peacock v. Pembroke, 4 Md. 280; Ramsdale v. Craighill, 9 Ohio, 199; Dixon v. Dixon, 18 Ohio, 113; Talbot v. Dennis, 1 Cart. 471; Casey v. Wiggin, 8 Gray, 231; Ellsworth v. Hinds, 5 Wis. 613; Bartlett v. Jane-way, 4 Sandf. Ch. 396; Barber v. Slade, 30 Vt. 191.

<sup>3</sup> Rees v. Keith, 11 Sim. 388; Bosvill v. Brander, 1 P. Wms. 458; Bates v. Dandy, 2 Atk. 208; Siter v. McClanachan, 2 Grat. 280.

<sup>4</sup> Mason v. McNeill, 23 Ala. 201; Donaldson v. West Branch Bank, 1 Barr, 288.

<sup>5</sup> Yoke v. Bennett, 1 Binn. 358; Flory v. Becker, 2 Penn. St. 471.

<sup>6</sup> Ibid.; Kreider v. Boyer, 10 Watts, 58; Stout v. Levan, 3 Penn. St. 285.

<sup>7</sup> Frauenfeldt's Est., 3 Whart. 415.

<sup>8</sup> Chandos v. Talbot, 2 P. Wms. 601; Bates v. Dandy, 2 Atk. 207; Hawkins v. Obin, id. 549; Parsons v. Parsons, 9 N. H. 309; Tucker v. Gordon, 5 N. H. 564; Schuyler v. Hoyle, 5 Johns. Ch. 196; Tuttle v. Fowler, 22 Conn. 58; Snowhill v. Snowhill, 1 Green, Ch. 30; Thomas v.

*in action* will not pass to the husband's assignees in bankruptcy, under general words;<sup>1</sup> nor by a voluntary assignment in trust for creditors.<sup>2</sup> But if the *choses* are specifically named, they will pass to such assignees, whether they are assignees in bankruptcy or voluntary.<sup>3</sup> But it is said that assignees in bankruptcy will take, subject to the wife's right of survivorship, if they do not reduce the *chose* to actual possession.<sup>4</sup> A fraudulent assignment of his wife's *choses*, as after desertion, or after proceedings for a divorce are begun, cannot be supported;<sup>5</sup> nor can a voluntary assignment without consideration.<sup>6</sup>

§ 642. In some States, the *choses in action* of the wife so far vest in the husband, although he does no act to reduce them to possession, that creditors may attach and seize them on execution, or by the trustee process.<sup>7</sup> But if the husband

Kelsoe, 7 Mon. 521; Lowry v. Houston, 3 How. (Miss.) 396; Shuman v. Reigart, 7 Watts & S. 168; Siter's Case, 4 Rawle, 468; Webb's App., 21 Penn. St. 248; Smilie's Est., 22 id. 130; Hill v. Townsend, 24 Tex. 575; Manion v. Titsworth, 18 B. Mon. 582.

<sup>1</sup> Eshelman v. Shuman, 13 Penn. St. 561.

<sup>2</sup> Skinner's App., 5 Penn. St. 263; Slaymaker v. Bank, 10 id. 373; Wright v. Rutter, 2 Ves. Jr. 673.

<sup>3</sup> Richwine v. Keim, 1 Penn. 373; Shuman v. Reigart, 7 Watts & S. 168; Eshelman v. Shuman, 13 Penn. St. 561; Siter's Case, 4 Rawle, 468; Barnes v. Pearson, 6 Ired. Eq. 482.

<sup>4</sup> Van Epps v. Van Deusen, 4 Paige, 64; Poor v. Hazleton, 16 N. H. 568; Outcalt v. Van Winkle, 1 Green. Ch. 513; Shay v. Sessaman, 10 Barr, 434; Krumbaar v. Burt, 2 Wash. C. C. 406; Shaw v. Mitchell, Davis, 216; Purdew v. Jackson, 1 Russ. 1; Hutchings v. Smith, 9 Sim. 137; Elwyn v. Williams, 7 Jur. 338; 12 L. J. Ch. 440; 13 Sim. 309; Ashby v. Ashby, 1 Coll. 554; Wilkinson v. Charlesworth, 10 Beav. 328; Le Vasseux v. Scrutton, 14 Sim. 118; Boston v. Boston, 13 Jur. 247; 16 Sim. 552; Macq. Husb. and Wife, 54; 2 Spence, Eq. Jur. 476.

<sup>5</sup> Krupp v. Scholl, 10 Penn. St. 194; Blenkinsop v. Blenkinsop, 1 De G., M. & G. 495. And see Tuttle v. Fowler, 22 Conn. 58.

<sup>6</sup> Wright v. Rutter, 2 Ves. Jr. 673; Burnett v. Kinnaston, 2 Vern. 401; Mitford v. Mitford, 9 Ves. 87; Johnson v. Johnson, 1 J. & W. 472; Jewson v. Moulson, 2 Atk. 417; Hartman v. Dowdel, 1 Rawle, 279.

<sup>7</sup> Wheeler v. Bowen, 20 Pick. 263; Holbrook v. Waters, 19 Pick. 354; Vance v. McLaughlin, 8 Grat. 289; Dodd v. Greiger, 2 Grat. 98; James v. Gibbs, 1 Pat. & H. 277.

dies before judgment, his wife will take the *choses* by survivorship.<sup>1</sup> In other States, it is held that nothing vests in the husband until he has elected to reduce the *chose in action* to possession, and has done some act to that end; and that creditors cannot reach such *choses* until they vest in the husband; and that the husband cannot be compelled to elect, or reduce them to possession.<sup>2</sup> It has been held that the right is so far personal to the husband that it cannot be exercised by a guardian if he is insane.<sup>3</sup>

§ 643. When the necessary steps are taken, a wife's *chose* is reduced to possession, her right to a settlement is barred, and her right by survivorship is destroyed, as where a bond is taken from an executor to the husband alone for a legacy due the wife, with or without judgment on the bond,<sup>4</sup> or a new security is taken in any form to the husband for the old security to the wife,<sup>5</sup> or a receipt is given by the husband alone for the *choses* of the wife,<sup>6</sup> or where a deed is made of the wife's property to trustees, in trust for the wife and her children.<sup>7</sup>

§ 644. If a note, bond, or legacy is given to a husband and wife jointly, the husband can collect the whole during his life, but if he does not reduce them to possession, they

<sup>1</sup> *Strong v. Smith*, 1 Met. 476 ; *Hayward v. Hayward*, 20 Pick. 517.

<sup>2</sup> *Skinner's App.*, 5 Penn. St. 263 ; *Sayre v. Flournoy*, 3 Kelly, 541 ; *Dennison v. Nigh*, 2 Watts, 90 ; *Robinson v. Woelper*, 1 Whart. 179 ; *Wheeler v. Moore*, 13 N. H. 478 ; *Andrews v. Jones*, 10 Ala. 400 ; *Coffin v. Morrill*, 2 Fost. 352 ; *Mellingen v. Vausmann*, 45 Penn. St. 522 ; *Stoner v. Commonwealth*, 16 id. 387 ; *Nolen's App.*, 23 id. 37 ; *Peacock v. Pembroke*, 4 Md. 280 ; *Harris v. Taylor*, 3 Sneed, 536 ; *Gallego v. Gallego*, 2 Brock. 287.

<sup>3</sup> *Andover v. Merrimac County*, 37 N. H. 437. But see *In re Jenkins*, 5 Russ. 183.

<sup>4</sup> *Stewart's App.*, 3 Watts & S. 476 ; *De Witt v. Eldred*, 4 id. 422 ; *Yerby v. Lynch*, 3 Grat. 460.

<sup>5</sup> *Searing v. Searing*, 9 Paige, 283.

<sup>6</sup> *Starke v. Starke*, 2 Rich. 438.

<sup>7</sup> *Siter's Case*, 4 Rawle, 464 ; *Hansen v. Miller*, 8 Jur. 209.

survive to his wife on his death.<sup>1</sup> If the property is in court, a settlement can be ordered; or the fund can be reserved, and the interest paid to the husband during his life.<sup>2</sup> In case of the settlement of property jointly upon husband and wife, the husband may receive the entire income during his life, and his interests may be seized by his creditors, and they pass to his assignees in bankruptcy, although the instrument of settlement contains provisions attempting to avoid such a result.<sup>3</sup>

§ 645. It has already appeared that a wife cannot ask for a settlement for herself alone, without including her children;<sup>4</sup> but this is a personal right, and the children cannot ask for a settlement after her death.<sup>5</sup> The wife, at any time before the settlement is actually executed, may waive it, and consent in court that her husband may take the property.<sup>6</sup> In some cases it was held, however, that the equity of the children attached upon the filing of the bill or petition of the wife; and that, if she died before further proceedings, the children might still be protected.<sup>7</sup> But, in the later

<sup>1</sup> *Pike v. Collins*, 33 Maine, 43; *Hayward v. Hayward*, 20 Pick. 517; *Laprimaudaye v. Teissier*, 12 Beav. 206; *Atcheson v. Atcheson*, 11 id. 485.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Carson v. O'Bannon*, 7 Rich. Eq. 219; *Rivers v. Thayer*, id. 166.

<sup>4</sup> *Murray v. Elibank*, 10 Ves. 90; 1 Lead. Cas. Eq. 360; *Lloyd v. Williams*, 1 Madd. 450; *Groves v. Clark*, 1 Keen, 132; *Napier v. Howard*, 3 Kelly, 193; *Udell v. Kenney*, 3 Cow. 609; *Groverman v. Diffenderffer*, 1 Gill & J. 22; *Howard v. Moffatt*, 2 Johns. Ch. 206; *Andrews v. Jones*, 10 Ala. 401.

<sup>5</sup> *Scriven v. Tapley*, 2 Ed. 337; *Amb. 509*; *Lloyd v. Williams*, 1 Madd. 450; *Martin v. Sherman*, 2 Sandf. Ch. 341; *Barker v. Woods*, 1 Sandf. Ch. 129; *Bell v. Bell*, 1 Kelly, 637.

<sup>6</sup> *Row v. Jackson*, 2 Dick. 604; *Murray v. Elibank*, 10 Ves. 84; 1 Lead. Cas. Eq. 360, notes; *Martin v. Mitchell*, 10 Ves. 89; 2 J. & W. 425.

<sup>7</sup> *Wallace v. Auldjo*, 1 De G. J. & Sm. 643; *Steinmetz v. Haltkin*, 1 Gl. & J. 64; *Murray v. Elibank*, 10 Ves. 84; *Groves v. Clark*, 1 Keen, 132; *Groves v. Perkins*, 6 Sim. 584; *Lloyd v. Williams*, 1 Madd. 450; *Mumford v. Murray*, 1 Paige, 621; *Helms v. Franciscus*, 2 Bland, 581; *Hill v. Hill*, 3 Strob. Eq. 94.

cases, it has been held that the rights of the children to have the settlement attach only after decree; and that, if the wife dies before the decree, the husband takes all by survivorship as his wife's administrator.<sup>1</sup> If there are no children, the order or decree for a settlement will not affect the husband's rights, if the wife dies before the execution of the instrument; but if the settlement is drawn and approved by the court, it will control the property.<sup>2</sup> Where there are no children, the husband's next of kin will take the property,<sup>3</sup> or the husband himself.<sup>4</sup>

§ 646. At common law, a husband became liable for his wife's debt contracted before marriage; he was also bound to maintain her and her children, and was entitled to the enjoyment of her property. In equity a woman, in contemplation of marriage, might contract with an intended husband for the continued separate use and control of a certain portion, or the whole of her property.<sup>5</sup> These agreements were sustained in equity, on the principle that a person may waive or renounce a valuable right if he pleases, and that the right of the husband to his wife's property could be re-

<sup>1</sup> *Delagarde v. Lampriere*, 6 Beav. 344.

<sup>2</sup> *Macauley v. Phillips*, 4 Ves. 19.

<sup>3</sup> *Carter v. Taggart*, 1 De G., M. & G. 286; *Bagshaw v. Winter*, 5 De G. & Sm. 466.

There will be for the future little occasion to consider settlements in the United States, since the statutes settle nearly all a married woman's property upon herself, without even the intervention of a trustee. It may happen, however, that questions may arise in relation to marriages previous to the passage of the acts in several States; or the property may come to the wife in some manner not embraced in the statutes, so that a husband's common-law rights may still extend to it. *Wright v. Brown*, 44 Pa. St. 224; *Colvin v. Currier*, 22 Barb. 387; *Haines v. Ellis*, 24 Penn. St. 253; *Foster v. Penn. Ins. Co.*, 34 id. 134; *Yale v. Dederer*, 18 N. Y. 265; 22 N. Y. 450; *Richen v. White*, 43 Barb. 92; *Rider v. Hulse*, 33 Barb. 264; 24 N. Y. 372. It has, therefore, been necessary to refer to the matter briefly. In a few years this branch of the law will be entirely obsolete in this country.

<sup>4</sup> *Walsh v. Wason*, L. R. 8 Ch. 482.

<sup>5</sup> *Parkes v. White*, 11 Ves. 228; 2 *Rop. Hus. and Wife*, 151.



nounced by him, as it was one of his privileges. Equity also permits a stranger to give and settle property upon a married woman to her sole and separate use, free from the interference and control of the husband.<sup>1</sup> It was at first thought to be an infringement upon marital rights for a stranger to confer property upon a wife, independent of her husband, over which he could have no control, and in which he could have no interest. Equity has sustained these gifts of property to the wife, independent of the husband, upon the ground that the donor of the property, being the absolute owner, has the absolute right to dispose of it to such persons, and upon such conditions and limitations, not contrary to law, as he chooses; and as the husband has no rights in such property, it is depriving him of no rights to confer none upon him. Thus it becomes a mere question of public policy, whether proprietary rights should be conferred upon a wife independent of her husband. Public policy in regard to the matter has settled down upon the propriety of conferring separate proprietary rights upon married women. Equity has taken one other step in favor of married women, which is not generally permitted in favor of men or unmarried women. In general, conditions or limitations forbidding the alienation of property by persons *sui juris* cannot be maintained; but courts of equity early sanctioned a condition or limitation of property upon married women, forbidding them

<sup>1</sup> Anderson v. Anderson, 2 M. & R. 427; Davies v. Thornycroft, 6 Sim. 420; Tullett v. Armstrong, 1 Beav. 1; 4 Myl. & Cr. 390; Scarborough v. Borman, 1 Beav. 34; 4 Myl. & Cr. 377. In Massey v. Parker, 2 Myl. & K. 174, Lord Cottenham remarked, that property settled to the separate use of an unmarried woman vested in her husband at her marriage, and a few cases in America have seemed to countenance the remark. Lindsay v. Harrison, 3 Eng. 311; Dick v. Pitchford, 1 Dev. & B. Eq. 480; Hamersley v. Smith, 4 Whart. 126; Miller v. Bingham, 1 Ired. 423; Apple v. Allen, 3 Jones, Eq. 342; Bridges v. Wilkins, id. 342; Gully v. Hall, 31 Miss. 20. But the great body of American cases sustain the law, as established in England by Tullett v. Armstrong, 1 Beav. 1; 4 M. & C. 377; Fears v. Brooks, 12 Ga. 197; Robert v. West, 15 Ga. 123; Nix v. Bradley, 6 Rich. Eq. 43; Fellows v. Tann, 9 Ala. 1003; Shirley v. Shirley, 9 Paige, 363; Beauford v. Collier, 6 Humph. 487; Bridges v. Wilkins, 3 Jones, Eq. 342.

to anticipate the income in any way; that is, prohibiting them in any way from selling the property or its future produce for a present sum in hand. Thus protected, a married woman may enjoy property in her own right, in such manner that neither she nor her husband, nor both together, can alienate or anticipate the income. (a)

§ 647. When these settlements or trusts for the separate use of married women were first established, it was supposed that a trustee was necessary,<sup>1</sup> but it is now determined that the interposition of an express trustee is not absolutely necessary; that if it is necessary in order to carry out the intention of the settlor to have a trustee, the husband shall be construed to take the legal title in trust for the wife, and he may be compelled to act accordingly.<sup>2</sup> But in order to sus-

<sup>1</sup> *Harvey v. Harvey*, 1 P. Wms. 125; 2 Vern. 659; *Burton v. Pierpont*, 2 P. Wms. 78; 2 Rop. Hus. and Wife, 152.

<sup>2</sup> *Richardson v. Stodder*, 100 Mass. 528; *Wilkinson v. Cheatham*, 45 Ala. 337; *Marsh v. Marsh*, 43 Ala. 677; *Lampley v. Watson*, id. 377; *Burnett v. Davis*, 2 P. Wms. 316; *Parker v. Brooke*, 9 Ves. 583; *Rollfe v. Budder*, Bunb. 187; *Prichard v. Ames*, T. & R. 222; *Newlands v. Poynter*, 10 Sim. 377; 4 Myl. & Cr. 408; *Turnley v. Kelley*, Wallis R. by Lyne, 311; *Archer v. Rooke*, 7 Ir. Eq. 478; *Darley v. Darley*, 3 Atk. 399; *Lee v. Prideaux*, 3 Bro. Ch. 383; *Baggett v. Meux*, 1 Phil. 627; *Rich v.*

(a) A married woman's separate estate is equitable. *Barlow v. Devany*, 36 F. R. 577; 40 id. 97. In England, by the Married Women's Property Act, 1882 (45 and 46 Vic. c. 75), a married woman may hold her own property separately, and sue and defend like a *feme sole*, without a next friend, and without joinder of the husband. See *Lowe v. Fox*, 15 Q. B. D. 667; *Weldon v. Winslow*, 13 id. 784; *Conolan v. Leyland*, 27 Ch. D. 632; *Weldon v. Riviere*, 53 L. J. Q. B. 448. This statute is limited to suits relating to herself personally, and does not ab-

rogate the general rule that a married woman cannot act as a next friend or guardian *ad litem*. *Re Duke of Somerset*, 34 Ch. D. 465; *London & County Banking Co. v. Bray*, W. N. (1893) 130. The expression "separate property" in sect. 1, sub-sec. 5 of that act includes only what would, if she were single, be her "property," not including a general power of appointment by deed or will of which he is the donee. *Ex parte Gilchrist*, 17 Q. B. D. 521; *In re Roper*, 39 Ch. D. 482.

tain a trust for the separate use of a married woman, the intention to exclude the husband must be clear and certain, and not a matter of inference; upon this principle that the husband is bound to maintain the wife, and bear the burdens incident to marriage, and he has *prima facie* a right to her property to enable him to discharge these obligations.<sup>1</sup> No particular form of words is necessary to create a trust for the separate use of the married woman; (a) but the intention to exclude the husband must be unequivocal,<sup>2</sup> and when the meaning is clear, the court will carry the intention into effect.<sup>3</sup>

Cockell, id. 375; Gardner v. Gardner, 1 Gif. 129; Major v. Lansley, 1 R. & M. 355; Herr's App., 5 Watts & S. 494; Reade v. Livingstone, 3 Johns. Ch. 490; Searing v. Searing, 9 Paige, 284; Shirley v. Shirley, id. 364; Pinney v. Fellows, 15 Vt. 536; Barron v. Barron, 24 Vt. 375; Grant v. Grant, 34 L. J. Ch. 641; Wade v. Fisher, 9 Rich. Eq. 362; Boykin v. Ciples, 2 Hill, Ch. 200; Bosken v. Giles, Rice, Eq. 316; Clark v. Makenna, Cheves, Eq. 163; Long v. White, 5 J. J. Marsh. 226; Trenton Banking Co. v. Woodruff, 1 Green, 118; Steel v. Steel, 1 Ired. Eq. 452; Freeman v. Freeman, 9 Mo. 772; Hamilton v. Bishop, 8 Yerg. 33; Jamison v. Brady, 6 Serg. & R. 466; Heck v. Clippenger, 5 Penn. St. 385; Fears v. Brooks, 12 Ga. 195.

<sup>1</sup> Wills v. Sayers, 4 Madd. 409; Massey v. Parker, 2 Myl. & K. 181; Kensington v. Dolland, id. 188; Moore v. Morris, 4 Dr. 37; *Ex parte* Ray, 1 Madd. 207; Rudisell v. Watson, 2 Dev. Eq. 430; Ashcroft v. Little, 4 Ired. Eq. 236; Hunt v. Booth, 1 Freem. 215; Williams v. Clairborne, 7 Sm. & M. 488; Carroll v. Lee, 3 Gill & J. 505; Evans v. Knorr, 4 Rawle, 66; Evans v. Gillespie, 1 Swan, 128; Cook v. Kennedy, 12 Ala. 42; Moss v. McCall, id. 630; Pollard v. Merrill, 15 Ala. 170; Mitchell v. Gates, 23 Ala. 428; Welch v. Welch, 14 Ala. 76; Hale v. Stone, id. 803; Fears v. Brooks, 12 Ga. 197.

<sup>2</sup> Nightingale v. Hidden, 7 R. I. 115.

<sup>3</sup> Darley v. Darley, 3 Atk. 399; Stanton v. Hall, 2 R. & M. 180; Stuart v. Kissam, 2 Barb. 294; West v. West, 3 Rand. 373; Lewis v. Adam, 6

(a) *Re* Peacock, 10 Ch. D. 490; *morton*, 90 Va. 311. If the property Bland v. Dawes, 17 id. 794. A is not actually settled to her separate use, the husband cannot make separate estate to her husband, and his wife deal with it as if it were separate property. *Cahill v. Cahill*, 8 A. C. 420; *Butler v. Butler*, 16 Q. B. D. 374, 378.

§ 648. A husband's right will not attach, if the gift is to the wife "for her sole and separate use;"<sup>1</sup> or "solely for her own use;"<sup>2</sup> or "for her livelihood;"<sup>3</sup> or "that she may receive and enjoy the profits;"<sup>4</sup> or "to be at her disposal;"<sup>5</sup> or "to be by her laid out in what she shall think fit;"<sup>6</sup> or "for her own use independent of the husband;"<sup>7</sup> or "not subject to his control;"<sup>8</sup> or "to her own use and benefit independent of any other person;"<sup>9</sup> or "to receive the rents

Leigh, 320; Perry v. Boileau, 10 Serg. & R. 208; Ballard v. Taylor, 4 Des. 550; Davis v. Cain, 1 Ired. Eq. 305; Heathman v. Hall, 3 id. 414; Hamilton v. Bishop, 8 Yerg. 33; Beaufort v. Collier, 6 Humph. 487; Somers v. Craig, 9 id. 467; Nixon v. Rose, 12 Grat. 485; Fears v. Brooks, 12 Ga. 195; Clark v. Maguire, 16 Mo. 362; Duvall v. Graves, 7 Bush, 461; Baal v. Morgner, 46 Mo. 48.

<sup>1</sup> Parker v. Brooke, 9 Ves. 583; Petty v. Booth, 19 Ala. 633; Scarborough v. Borman, 1 Beav. 34; 4 Myl. & Cr. 377; Archer v. Rooke, 7 Ir. Eq. 498.

<sup>2</sup> *Re Tarsley's Trust*, L. R. 1 Eq. 561; Adamson v. Armitage, 19 Ves. 416; Coop. 283; *Ex parte Ray*, 1 Madd. 199; *Ex parte Killick*, 3 Mont. D. & D. 480; Davis v. Prout, 7 Beav. 288; Arthur v. Arthur, 11 Ir. Eq. 511; Lindsell v. Thacker, 12 Sim. 178; Massey v. Parker, 2 Myl. & K. 181; — v. Lyne, Yo. 562; Tullett v. Armstrong, 4 Myl. & Cr. 403; Gilbert v. Lewis, 1 De G., J. & S. 39; Lewis v. Mathews, L. R. 2 Eq. 177; Inglefield v. Coghlan, 2 Coll. 247; Jamison v. Brady, 6 Serg. & R. 466; Snyder v. Snyder, 10 Penn. St. 423; Fisher v. Filbert, 6 id. 61; Jarvis v. Prentice, 19 Conn. 273; Goodrum v. Goodrum, 8 Ired. Eq. 313; Cuthbert v. Rolf, 19 Ala. 373; Warren v. Haley, 1 Sm. & M. Ch. 647; Stuart v. Kissam, 3 Barb. 494; Griffith v. Griffith, 5 B. Mon. 113; Collins v. Rudolph, 19 Ala. 616.

<sup>3</sup> Darley v. Darley, 3 Atk. 399; Cape v. Cape, 2 Y. & C. 543; Lee v. Prideaux, 3 Bro. Ch. 383; Wardle v. Claxton, 9 Sim. 524.

<sup>4</sup> Tyrrell v. Hope, 2 Atk. 558.

<sup>5</sup> Prichard v. Ames, T. & R. 222; Kirk v. Paulin, 7 Vin. 96; Tyler v. Lake, 2 R. & M. 188; Stanton v. Hall, id. 180.

<sup>6</sup> Atcherley v. Vernon, 10 Mod. 531.

<sup>7</sup> Waggstaff v. Smith, 9 Ves. 520; Dixon v. Olmius, 2 Cox, 414; Simons v. Horwood, 1 Keen, 9; Newlands v. Paynter, 4 Myl. & Cr. 408; Tullett v. Armstrong, 1 Beav. 1; 4 Myl. & Cr. 377.

<sup>8</sup> Bain v. Lescher, 11 Sim. 397.

<sup>9</sup> Margetts v. Barringer, 7 Sim. 482; Newman v. James, 12 Ala. 29; Brown v. Johnson, 17 Ala. 232; Gould v. Hill, 18 Ala. 84; Williams v. Maull, 20 Ala. 721; Gillespie v. Burleson, 28 Ala. 551; Ashcraft v. Little, 4 Ired. Eq. 236; Glover v. Hare, 16 Sim. 568.

while she lives, whether married or single;"<sup>1</sup> and not to sell or mortgage, or "her receipt to be a sufficient discharge;"<sup>2</sup> or "to be delivered to her on demand;"<sup>3</sup> or if the gift is to the husband, should he be living with his wife, but if separate, then half to the husband and the other half to the wife "absolutely;"<sup>4</sup> or "to be for her own and her family's use during her natural life;"<sup>5</sup> or "to be paid to her semi-annually during her life, and afterwards to her children;"<sup>6</sup> or "to be at her own disposal in true faith to her and her heirs forever;"<sup>7</sup> or "for the use and benefit of the wife and her heirs;"<sup>8</sup> or "for the entire use, benefit, profit, and advantage of the wife;"<sup>9</sup> or "not to be sold, bartered, or traded by the husband;"<sup>10</sup> or "for her support."<sup>11</sup> A conveyance by a husband in trust for his wife is for her separate use;<sup>12</sup> a gift to her separate use and a subsequent legacy in addition thereto are separate;<sup>13</sup> and so is a provision not to be liable for a husband's debts,<sup>14</sup> the devisee and her heirs to use and enjoy the rents,<sup>15</sup> "to be hers and hers only;"<sup>16</sup> or that her husband shall not dispose of the property without her

<sup>1</sup> *Goulder v. Camm*, De G., F. & J. 146; 6 Jur. (N. S.) 113.

<sup>2</sup> *Lee v. Prideaux*, 3 Bro. Ch. 381, n., 383; *Stanton v. Hall*, 2 R. & M. 180; *Tyler v. Lake*, id. 188.

<sup>3</sup> *Dixon v. Olmius*, 2 Cox, 414.

<sup>4</sup> *Shewell v. Dwarries*, 1 Johns. (Eng.) 172; *Brown v. Johnson*, 17 Ala. 232.

<sup>5</sup> *Heck v. Clippenger*, 5 Penn. St. 385.

<sup>6</sup> *Tyson's App.*, 10 Penn. St. 221; *Heck v. Clippenger*, 5 id. 385; *Hamilton v. Bishop*, 8 Yerg. 33; *Strong v. Gregory*, 19 Ala. 146.

<sup>7</sup> *Bridges v. Wood*, 4 Dana, 610.

<sup>8</sup> *Good v. Harris*, 2 Ired. Eq. 630.

<sup>9</sup> *Heathman v. Hall*, 3 Ired. Eq. 414.

<sup>10</sup> *Woodrum v. Kirkpatrick*, 2 Swan, 218; *Clarke v. Windham*, 12 Ala. 798.

<sup>11</sup> *Markley v. Singletary*, 11 Rich. Eq. 393.

<sup>12</sup> *Steele v. Steele*, 1 Ired. Eq. 452, is inconsistent with *Wade v. Fisher*, 9 Rich. Eq. 362.

<sup>13</sup> *Warwick v. Hawkins*, 21 L. J. Ch. 796; *Davis v. Cain*, 1 Ired. Eq. 334.

<sup>14</sup> *Martin v. Bell*, 9 Rich. Eq. 42; *Young v. Young*, 3 Jones Eq. 216.

<sup>15</sup> *Gardenhire v. Hinds*, 1 Head, 402.

<sup>16</sup> *Ellis v. Woods*, 9 Rich. Eq. 19; *Ozley v. Ikelheimer*, 26 Ala. 332.

consent;<sup>1</sup> or that she enjoy and receive the rents and profits.<sup>2</sup> A gift to the wife "exclusively" will exclude the husband.<sup>3</sup>

§ 649. On the other hand, it has been held that the following expressions are not so unequivocal as to afford certain evidence of an intention to exclude the husband from all control: "In trust to pay to her;"<sup>4</sup> or "to her and her assigns;"<sup>5</sup> or "to her use;"<sup>6</sup> or "to her own use;"<sup>7</sup> or to "her absolute use;"<sup>8</sup> or "to her heirs and assigns for her or their own sole use;"<sup>9</sup> or "to pay into her own proper hands for her own use;"<sup>10</sup> or "to pay to her to be applied to the maintenance of herself, and such child as the testator might happen to leave at his death;"<sup>11</sup> or "for the joint use of the husband and wife;"<sup>12</sup> or "the gift not to extend to any other person;"<sup>13</sup> or "to her and the heirs of her body, and to them alone;"<sup>14</sup> or "to A. during her life, and after her death to

<sup>1</sup> *Johnes v. Lockhart*, 3 Bro. Ch. 383, n.

<sup>2</sup> *Tyrrell v. Hope*, 2 Atk. 561; *Atcherley v. Vernon*, 10 Mod. 531; *Goulder v. Camm*, 1 De G., F. & J. 146.

<sup>3</sup> *Gould v. Hill*, 18 Ala. 84.

<sup>4</sup> *Dakins v. Berisford*, 1 Ch. Cas. 194; *Lumb v. Milnes*, 5 Ves. 517; *Brown v. Clarke*, 3 Ves. 166; *Stanton v. Hall*, 2 R. & M. 175; *Beales v. Spencer*, 2 N. C. C. 65.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Jacobs v. Amyatt*, 1 Madd. 376, n.; *Wills v. Sayers*, 4 id. 411; *Anon.* cited 7 Vin. 96; *Torbett v. Twining*, 1 Yeates, 432; *Tenant v. Stoney*, 1 Rich. Eq. 222.

<sup>7</sup> *Johnes v. Lockhart*, 3 Bro. Ch. 383, n.; *Wills v. Sayers*, 4 Madd. 409; *Roberts v. Spicer*, 5 Madd. 491; *Beales v. Spencer*, 2 Y. & C. Ch. 651; *Darcy v. Croft*, 9 Ir. Eq. 19.

<sup>8</sup> *Rycroft v. Christy*, 3 Beav. 328; *Ex parte Abbott*, 1 Deacon, 338.

<sup>9</sup> *Lewis v. Mathews*, L. R. 2 Eq. 177; *Rudisell v. Watson*, 2 Dev. Eq. 430; *Houston v. Embry*, 1 Sneed, 480.

<sup>10</sup> *Tyler v. Lake*, 2 R. & M. 183; *Kensington v. Dolland*, 2 Myl. & K. 184; *Blacklow v. Laws*, 2 Hare, 48; *Hartley v. Hurle*, 5 Ves. 545, *contra*.

<sup>11</sup> *Wardle v. Claxton*, 9 Sim. 524; *Chipchase v. Simpson*, 16 Sim. 485.

<sup>12</sup> *Bender v. Reynolds*, 12 Ala. 446; *Geyer v. Branch Bank*, 21 Ala. 414.

<sup>13</sup> *Ashcroft v. Little*, 4 Ired. Eq. 236.

<sup>14</sup> *Foster v. Kerr*, 4 Rich. Eq. 390; *Clevestine's App.*, 15 Penn. St. 499.

her issue;"<sup>1</sup> or "to her use and benefit;"<sup>2</sup> for maintenance and support;<sup>3</sup> or "not to be liable for the husband's debts."<sup>4</sup> The mere gift to a trustee is not enough;<sup>5</sup> nor a mere direction to pay the income to the wife;<sup>6</sup> nor a bond to convey to the wife;<sup>7</sup> nor a conveyance to a wife and her heirs.<sup>8</sup> A direct devise to a widow to her sole use and benefit is not enough;<sup>9</sup> nor a gift to a wife only.<sup>10</sup>

§ 650. The authorities in the several States, and even in the same State, are conflicting with each other, as to what words are sufficient, and what are not sufficient, to create a separate use in a married woman. It is wholly a matter of intention to be gathered from the whole instrument; therefore the context may compel the court to give a different meaning to the same words; or, rather, the court may be compelled to draw different conclusions of fact from the same words in different wills, the burden always being upon those who attempt to exclude the husband to show that such is the necessary intention of the instrument. In one case it was said that the expressions which create a separate estate may be arranged in three classes: (1) Where the technical words "sole and separate use" or equivalent words are used; (2) Where the marital rights of the husband are expressly excluded; (3) Where the wife is empowered to perform acts concerning the estate given to her, inconsistent with the disabilities of coverture.<sup>11</sup>

<sup>1</sup> *Bryan v. Duncan*, 11 Ga. 67.

<sup>2</sup> *Fears v. Brooks*, 12 Ga. 198; *Clevestine's App.*, 15 Penn. St. 499.

<sup>3</sup> *Austin v. Austin*, 4 Ch. D. 233; *Cape v. Cape*, 2 Y. & C. Ex. 543.

<sup>4</sup> *Gillespie v. Burlison*, 28 Ala. 551. *Contra* are *Martin v. Bell*, 9 Rich. Eq. 42; *Young v. Young*, 3 Jones, Eq. 266.

<sup>5</sup> *Williams v. Maull*, 20 Ala. 727; *Hunt v. Booth*, 1 Freem. Ch. 215; *Mayberry v. Neely*, 5 Humph. 339; *Evans v. Knorr*, 4 Rawle, 66; *Welch v. Welch*, 14 Ala. 77; *Pollard v. Merrill*, 15 Ala. 170.

<sup>6</sup> *Fitch v. Ayer*, 2 Conn. 143.

<sup>7</sup> *Moore v. Jones*, 13 Ala. 296.

<sup>8</sup> *Hall v. Sayre*, 10 B. Mon. 46; *Fitch v. Ayer*, 2 Conn. 143; *Shirley v. Shirley*, 9 Paige, 364.

<sup>9</sup> *Gilbert v. Lewis*, 1 De G., J. & M. 38.

<sup>10</sup> *Spirett v. Willows*, 11 Jur. (N. S.) 70.

<sup>11</sup> *Nix v. Bradley*, 6 Rich. Eq. 48.

§ 651. The trust must be for the benefit of the wife, exclusive of all other persons; for if the gift is to trustees for the benefit of the wife and her husband, or of the wife and her children, or of the wife and any other person or persons, the marital rights of the husband will not be excluded; although the terms of the gift are such that if the gift was to the wife alone, a separate estate would be created in her.<sup>1</sup> So, if the gift is to the husband and another as trustees for the wife, it will not be to her separate use;<sup>2</sup> but a gift to the husband alone, in trust for his wife, will be to her separate use.<sup>3</sup>

§ 652. As before said, if property is conveyed to a single woman for her sole and separate use, she has the same control of it before marriage as if it was given to her absolutely; but the limitation to her sole and separate use will take effect upon her marriage.<sup>4</sup> Until then, the words have no

<sup>1</sup> *Wardle v. Claxton*, 9 Sim. 524; *Ashcroft v. Little*, 4 Ired. Eq. 236; *Inge v. Forrester*, 6 Ala. 418; *Jasper v. Howard*, 12 Ala. 652; *Good v. Harris*, 2 Ired. Eq. 630; *Hamilton v. Bishop*, 8 Yerg. 33; *Chipchase v. Simpson*, 16 Sim. 485; *Bender v. Reynolds*, 12 Ala. 446; *Geyer v. Branch Bank*, 2 Ala. 414; *Lewis v. Matthews*, L. R. 2 Eq. 177; *Rudisell v. Watson*, 2 Dev. Eq. 430; *Houston v. Embry*, 1 Sneed, 480. But see *Heck v. Clippenger*, 5 Penn. St. 385.

<sup>2</sup> *Ex parte Bulby*, 1 Glyn & Jam. 167; *Kensington v. Dolland*, 2 M. & K. 184.

<sup>3</sup> *Ibid.*; *Darley v. Darley*, 3 Atk. 399.

<sup>4</sup> *Schaforth v. Ambs*, 46 Mo. 114; *Brandon v. Robinson*, 18 Ves. 429; *Hallett v. Thompson*, 5 Paige, 383; *Dick v. Pitchford*, 1 Dev. & B. 480; *Blackstone Bank v. Davis*, 21 Pick. 42; *Nickel v. Hanley*, 10 Grat. 336; *Tullett v. Armstrong*, 4 M. & C. 377; *Newlands v. Paynter*, 4 M. & C. 408; *Russell v. Dickson*, 2 Dr. & War. 138; *Scarborough v. Borman*, 1 Beav. 34; *Clark v. Wyndham*, 12 Ala. 870; *Miller v. Bingham*, 1 Ired. Eq. 423; *Smith v. Starr*, 3 Whart. 62; *Hammersley v. Smith*, 4 id. 126. The proposition stated in the text is not the law of Pennsylvania, unless the trust is an active trust which requires the legal title to continue in the trustee. In that State, to create a valid trust for the sole and separate use of a woman, it is necessary that she should be married at the time, or that she should be in the immediate contemplation of a marriage. This rule is supposed to follow from the doctrine laid down in *Lancaster v. Dolan*, 1 Rawle, 231. It was first expressly decided in *Smith v. Starr*, 3 Whart. 63, and is now the established rule. See *Hammersley v. Smith*, 4 Whart.



effect upon the property. Where the conveyance is directly to a single woman to her separate use without a trustee, the husband becomes her trustee on marriage.<sup>1</sup> But if a fund is given to a married woman for her separate use without a trustee, and her husband dies, and she sells the fund, and converts it into other property, and marries again, her husband will take it in the ordinary manner at common

129; *McBride v. Smyth*, 54 Penn. St. 250; *Yarnall's App.*, 70 id. 339; *Ogden's App.*, id. 501; *Snyder's App.*, 92 id. 504. The case of *Smith v. Starr* was based upon *Massey v. Parker*, 2 Myl. & K. 174; and although *Massey v. Parker* was soon overruled (see *Tullett v. Armstrong*, 4 Myl. & Cr. 174; 1 Beav. 1), the doctrine of the case, after considerable litigation and some variety of decisions, has become the settled law of that State. See *Dodson v. Ball*, 60 Penn. St. 492; *Frevogle v. Hughes*, 54 id. 228; *Hepburn's App.*, 65 id. 472; *Megargee v. Naglee*, 64 id. 216; *Springer v. Arundell*, id. 218; *Shonk v. Brown*, 61 id. 325; *Pickering v. Coates*, 10 Phila. (Pa.) 65. It follows from this rule, that if a trust is created for a *feme sole* not in contemplation of marriage, the property vests at once in her, or she may call for a conveyance at once, provided the trust is not otherwise an active one. And even if she is married after the creation of the trust, but did not contemplate a marriage at the time of its creation, she may still call for a conveyance of the property. So if her husband dies the trust ceases, although well created in the first instance, and does not revive upon a second marriage. *Wells v. McCall*, 64 Penn. St. 207; *Megargee v. Naglee*, id. 216; *Frevogle v. Hughes*, 56 id. 230. It need not appear, however, upon the face of the will or settlement, that the trust for a *feme sole* is created in contemplation of her marriage, if the fact can be shown in any reasonable manner, and that it was known to the testator or settlor. *Wells v. McCall*, 64 Penn. St. 207; *Springer v. Arundell*, id. 218. See §§ 310, 310 a, and cases cited. See also, upon the general subject, *Potts's App.*, 30 Penn. St. 168; *Dubs v. Dubs*, 31 id. 149; *Lyne's Ex'rs v. Crouse*, 1 id. 111; *Wallace v. Coston*, 9 Wall. 137; *Snyder v. Snyder*, 10 Penn. St. 423; *Harrison v. Brolaskey*, 20 id. 302; *Farie's App.*, 23 id. 30; *Van Rensselaer v. Dunkin*, 24 id. 252; *Talbot v. Calvert*, id. 328; *Nice's App.*, 49 id. 148; *Tassey's Trust*, L. R. 1 Eq. 561; *Scarborough v. Borman*, 4 Myl. & Cr. 392; *Beable v. Dodd*, 1 T. R. 193; *Anderson v. Anderson*, 2 Myl. & Cr. 427; ——— *v. Lyne, Younge*, 562; *Newton v. Reid*, 4 Sim. 1; *Woodmeston v. Walker*, 2 R. & M. 187; *Brown v. Pocock*, id. 218; *Barton v. Briscoe*, Jac. 603; *Jones v. Salter*, 2 R. & M. 208; *Davies v. Thornycroft*, 6 Sim. 420. A deed of trust made by a young woman within a year before her marriage held to be in contemplation of her marriage. *Ash v. Bowen*, 10 Phila. 96.

<sup>1</sup> *Ibid.*; *Archer v. Rooke*, 7 Ir. Eq. 478.

law.<sup>1</sup> Thus property conveyed to a married woman to her sole and separate use becomes absolutely hers, and may be sold by her as soon as her husband dies, or creditors may seize it for her debts.<sup>2</sup>

§ 653. If property is settled to the separate use of a woman, and the separate use is *intended* to be confined to a particular marriage, and the husband dies, and the widow marries again, the second husband will take his common-law rights in the property.<sup>3</sup> So if property is settled on a married woman for her separate use, independent of her husband, "B.," and "B." dies, and the widow marries again, her second husband will take his common-law rights over the property.<sup>4</sup> But if the separate use is plainly intended by the instrument to extend to all future marriages, the intent will be carried into effect, so long as it can be applied to the property, and to all the income, whether in arrears or not at the time of the marriage.<sup>5</sup> Whether the separate use shall continue through several marriages is wholly a matter of intention. (a) There was at one time a disposition to confine it to the first or present coverture; for, the moment the first husband is dead, the widow has an absolute power of disposal, and it was thought that, if a husband took a wife

<sup>1</sup> Ibid.; *Wright v. Wright*, 2 John. & H. 647; *Spicer v. Dawson*, 5 W. R. 431; *Mayd v. Field*, 3 Ch. D. 587.

<sup>2</sup> Ibid. See all the cases before cited to this section. *Barton v. Briscoe*, Jac. 603; *Jones v. Salter*, 2 R. & M. 208; *Woodmeston v. Walker*, id. 197; *Parker v. Converse*, 5 Gray, 336; *Megargee v. Naglee*, 64 Penn. St. 216; *William's App.*, 83 id. 377-395.

<sup>3</sup> *Barton v. Briscoe*, Jac. 603; *Benson v. Benson*, 6 Sim. 126; *Knight v. Knight*, id. 121; *Jones v. Salter*, 2 R. & M. 208; *Moore v. Harris*, 4 Dr. 33; *Tudor v. Samyne*, 2 Vern. 270; *Turner's Case*, 1 Ch. Cas. 307; 1 Vern. 7; *Saunders v. Page*, 3 Ch. R. 224; *Pitt v. Hunt*, 1 Vern. 18; *Howard v. Hooker*, 2 Ch. R. 81; *Edmonds v. Dennington*, cited 2 Vern. 17.

<sup>4</sup> *Moore v. Harris*, 4 Dr. 33.

<sup>5</sup> *Ashton v. McDougall*, 5 Beav. 56; *Re Gaffee*, 7 Hare, 101; 1 Mac. & G. 541.

(a) See *Winchester v. Machen*, 75 Md. 538.

with such powers over her property, he must take his common-law rights over it;<sup>1</sup> but it is now established, that, if the property is clearly settled to the separate use of a woman, such separate use will attach so often as she may be married.<sup>2</sup>

§ 654. A married woman may deal with property settled to her separate use precisely as she could deal with it if she were a single woman, and without the concurrence of the trustees, unless the power of anticipation is restrained, and unless there are provisions in the instrument of settlement preventing her.<sup>3</sup> Lord Thurlow said that “a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole*.”<sup>4</sup> But she will be protected against fraud, and the improper influence of her husband.<sup>5</sup> Therefore a married woman may sue and be sued in regard to her separate property.<sup>6</sup> She may obtain an order to answer separately as a defendant,<sup>7</sup> and she may be served with process by leave of court if out of the jurisdiction.<sup>8</sup> She may present a petition with or without her hus-

<sup>1</sup> *Hammersley v. Smith*, 4 Whart. 126; *Lindsay v. Harrison*, 3 Eng. 311; *Dick v. Pitchford*, 1 Dev. & B. Eq. 480; *Miller v. Bingham*, 1 Ired. Eq. 423; *Massey v. Parker*, 2 M. & K. 174; *Smith v. Starr*, 3 Whart. 62. See *Harrison v. Brolaskey*, 20 Penn. St. 299; *Steacy v. Rice*, 27 id. 75; *Clarke v. Wyndham*, 12 Ala. 800.

<sup>2</sup> *Roberts v. West*, 15 Ga. 123; *Gaffee's Trust*, 1 Mac. & Gor. 541, overruling 7 Hare, 101; *Beaufort v. Collier*, 6 Humph. 487; *Shirley v. Shirley*, 9 Paige, 364; *Waters v. Tazewell*, 9 Md. 291; *Tullett v. Armstrong*, 1 Beav. 1; 4 Myl. & Cr. 377; *Scarborough v. Borman*, 1 Beav. 34. See § 652, and notes.

<sup>3</sup> *Grigby v. Cox*, 1 Ves. 518; *Dowling v. Maguire*, Plunket, 19; *Essex v. Atkins*, 14 Ves. 552; *Coryell v. Dunton*, 7 Penn. St. 532.

<sup>4</sup> *Hulme v. Tenant*, 1 Bro. Ch. 20; 1 Lead. Cas. Eq. 398, and notes.

<sup>5</sup> *Knight v. Knight*, 11 Jur. (n. s.) 618.

<sup>6</sup> *Jackson v. Haworth*, 1 S. & S. 161; *Thompson v. Beaseley*, Eq. R. 59.

<sup>7</sup> *Ibid.* But if she answer separately, without leave of the court, her answer will be quashed. *Perine v. Swaine*, 1 Johns. Ch. 24; see *Ferguson v. Smith*, 2 id. 139.

<sup>8</sup> *Copperthwaite v. Tuite*, 13 Ir. Eq. 68.

band;<sup>1</sup> and she will be bound by her submission in her bill,<sup>2</sup> or answer,<sup>3</sup> or by a settlement of accounts,<sup>4</sup> or by a contract of sale,<sup>5</sup> and she may be made a contributor in the winding-up order of a corporation;<sup>6</sup> her declarations may be read in evidence against her,<sup>7</sup> and she will be liable to attachment for want of an answer when she answers separately,<sup>8</sup> or for disobeying the orders of the court;<sup>9</sup> or her separate property may be ordered to be sequestered.<sup>10</sup> But in all proceedings in equity in relation to the wife's separate estate, the husband ought to be made a defendant, especially if he claims any interest, or any of his acts are in question.<sup>11</sup>

§ 655. In England a married woman, being considered a single woman in relation to her separate property,<sup>12</sup> may exercise all the rights incident to the ownership of property, unless her power is restricted by the instrument of convey-

<sup>1</sup> *Re Crump*, 34 Beav. 570.

<sup>2</sup> *Allen v. Papworth*, 1 Ves. 163.

<sup>3</sup> *Clerk v. Miller*, 2 Atk. 379; *Bailey v. Jackson*, C. P. Cooper, 495; *Cowdery v. Way*, *Lewin on Trusts*, 541 (5th ed.); *Callow v. Howle*, 1 De G. & Sm. 531; *Beeching v. Morphew*, 8 Hare, 120; *Clive v. Carew*, 1 John. & H. 207.

<sup>4</sup> *Wilton v. Hill*, 25 L. J. Ch. 156.

<sup>5</sup> *Davidson v. Gardner*, Sugd. V. & P. 891 (11th ed.); *Stead v. Nelson*, 2 Beav. 248; *Harris v. Mott*, 14 id. 169; *Vansittart v. Vansittart*, 4 K. & J. 70; *Milnes v. Busk*, 2 Ves. Jr. 498.

<sup>6</sup> *Re Leeds Banking Co.*, 1 W. N. 361.

<sup>7</sup> *Peacock v. Monk*, 2 Ves. 193.

<sup>8</sup> *Graham v. Fitch*, 2 De G. & Sm. 246; *Taylor v. Taylor*, 12 Beav. 271; *Home v. Patrick*, 30 id. 405.

<sup>9</sup> *Ottway v. Wing*, 12 Sim. 90.

<sup>10</sup> *Keogh v. Cathcart*, 11 Ir. Eq. 280.

<sup>11</sup> *Thorby v. Yates*, 1 Y. & Coll. Ch. 438; *Bradley v. Emerson*, 7 Vt. 369; *Clarkson v. De Peyster*, 3 Paige, 336; *Dewall v. Covenhoven*, 5 id. 581; *Grout v. Van Schoonhoven*, 9 id. 255; *Stuart v. Kissam*, 2 Barb. S. C. 493; *Sherman v. Burnham*, 6 Barb. 403; *Wilson v. Wilson*, 6 Ired. Eq. 236.

<sup>12</sup> *Hulme v. Tenant*, 1 Bro. Ch. 21; 1 Lead. Cas. Eq. 398; *Socket v. Wray*, 4 Bro. Ch. 486; *Peacock v. Monk*, 2 Ves. 190; *Pybus v. Smith*, 4 Bro. Ch. 346; *Lillia v. Airey*, 1 Ves. Jr. 278; *Wagstaff v. Smith*, 9 Ves. 524; *Witts v. Dawkins*, 12 Ves. 501; *Sturgis v. Corp*, 13 Ves. 190.

ance; therefore, if personal property is simply given to her separate use, she may sell the same as if she were single.<sup>1</sup> (a) In New Jersey,<sup>2</sup> Connecticut,<sup>3</sup> Kentucky,<sup>4</sup> Virginia,<sup>5</sup> North Carolina,<sup>6</sup> Alabama,<sup>7</sup> Georgia,<sup>8</sup> Missouri,<sup>9</sup> the same rule is followed. But if a particular mode of dealing with her separate personal estate is prescribed in the instrument of settlement, and particular powers are given to her to be exercised, and alienation is forbidden, either in express or implied terms, she cannot deal with the estate, except in the manner pointed out, and she cannot sell in any other or different manner,<sup>10</sup> (b) even by proceedings in court.<sup>11</sup> This

<sup>1</sup> *Fettiplace v. Gorges*, 3 Bro. Ch. 10.

<sup>2</sup> *Leaycraft v. Hedden*, 3 Green, Ch. 512.

<sup>3</sup> *Imlay v. Huntington*, 20 Conn. 175; *Dunlap v. Plumb*, 8 Conn. 447; *Leavitt v. Beirne*, 21 Conn. 1; *Wells v. Thorman*, 37 Conn. 319.

<sup>4</sup> *Coleman v. Woolley*, 10 B. Mon. 320; *Shipp v. Bowmar*, 5 id. 163.

<sup>5</sup> *Vizoneau v. Pegram*, 2 Leigh, 183.

<sup>6</sup> *Newlin v. Freeman*, 4 Ired. Eq. 312.

<sup>7</sup> *Bradford v. Greenway*, 17 Ala. 805; *Collins v. Lavenberg*, 19 Ala. 685.

<sup>8</sup> *Fears v. Brooks*, 12 Ga. 200; *Wylly v. Collins*, 9 Ga. 223.

<sup>9</sup> *Coats v. Robinson*, 10 Mo. 757; *Kirwin v. Weippert*, 46 Mo. 532.

<sup>10</sup> *Ross v. Ewer*, 2 Atk. 156; *Croft v. Slee*, 4 Ves. 60; *Anderson v. Dawson*, 15 Ves. 532; *Hopkins v. Myall*, 2 R. & M. 86; *Albany Ins. Co. v. Bay*, 4 Comst. 9; *Fears v. Brooks*, 12 Ga. 200; *Leaycraft v. Hedden*, 3 Green, Ch. 512; *Williamson v. Beckham*, 8 Leigh, 20.

<sup>11</sup> *Richards v. Chambers*, 10 Ves. 580.

(a) In *Ankeney v. Hannon*, 147 U. S. 118, 128, Field, J., said: "The separate estate of a married woman is, in the absence of legislation on the subject, created by conveyance, devise, or contract. Its creation gives to her the beneficial use of the property which otherwise would not be brought under her control. As to such property she is regarded in equity as a *feme sole*, and it was, therefore, formerly held that her general engagements, though not personally binding upon her, could

be enforced against the property. This doctrine, however, has been modified in modern times. It is now held that to charge her separate estate with her engagement, it must be made with an intention on her part to create a charge upon such estate; that is, with reference to the property, either for its improvement or for her benefit upon its credit;" and it is conceded that she must have intended to charge her separate estate with her contract.

(b) *Martin v. Fort*, 83 F. R. 19.

rule is followed in all the American States, with this further addition in some of the States, that, unless the power of alienation is given to her in the instrument of settlement, she cannot sell the personal estate at all; for the reason that she, as a married woman, can exercise no powers not conferred upon her by the gift, and the mere gift of personal property to her sole and separate use does not in express terms, nor by necessary implication, confer upon her the power of acting as a single woman, and of selling the same. This is the law in Pennsylvania,<sup>1</sup> South Carolina,<sup>2</sup> Rhode Island,<sup>3</sup> Maryland,<sup>4</sup> Mississippi,<sup>5</sup> and Tennessee.<sup>6</sup> In New York, this limitation of a wife's power of selling was first established by Chancellor Kent;<sup>7</sup> but he was overruled, and the English doctrine, that a wife may sell her separate personal property, unless prohibited, has prevailed.<sup>8</sup> In States where the English rule prevails, if a power is given to a married woman to be exercised in relation to her separate personal property, and the absolute interest is given to her in default of her exercise of the power, she may decline to exercise the power, and thereby acquire the right to sell the property as a single woman.<sup>9</sup> Where a wife disposes of her separate property in trust, under a power contained in the instrument, the trustee must see to it that the power is executed as it is given; for if a married woman should dispose of the property in a man-

<sup>1</sup> *Lancaster v. Dolan*, 1 Rawle, 236.

<sup>2</sup> *Dunn v. Dunn*, 1 S. C. 350; *Ewen v. Smith*, 3 Des. 417; *Reid v. Lamar*, 1 Strob. Eq. 27; *Calhoun v. Calhoun*, 2 Strob. 231; *Porcher v. Reid*, 12 Rich. Eq. 349; *Nix v. Bradly*, 6 id. 53.

<sup>3</sup> *Metcalf v. Cook*, 2 R. I. 355.

<sup>4</sup> *Miller v. Williamson*, 5 Md. 219; *Tarr v. Williams*, 4 Md. Ch. 68.

<sup>5</sup> *Doty v. Mitchell*, 9 Sm. & M. 435.

<sup>6</sup> *Marshall v. Stephens*, 8 Humph. 159; *Litton v. Baldwin*, id. 209; *Young v. Young*, 7 Cold. 461; *Sherman v. Turpin*, id. 382.

<sup>7</sup> *Methodist Church v. Jaques*, 3 Johns. Ch. 78.

<sup>8</sup> *Methodist Church v. Jaques*, 17 Johns. 548, overruling 3 Johns. Ch. 78; *Dyett v. Coal Co.*, 20 Wend. 570.

<sup>9</sup> *Elton v. Shepherd*, 1 Bro. Ch. 532; *Anderson v. Dawson*, 15 Ves. 532; *Barford v. Street*, 16 Ves. 135; *Barrymore v. Ellis*, 8 Sim. 1; 2 Rop. Hus. and Wife, 230.

ner not authorized by the power, and the trustee should part with the fund, he would be liable to replace it.<sup>1</sup>

§ 656. Where real estate is conveyed, either absolutely to the separate use of a married woman, or to a trustee for her absolute separate use, she can sell and dispose of it only in the manner provided by law. She must execute and acknowledge a deed. In most States it is provided by law that a married woman shall not convey her real estate without the consent of her husband in writing, for the reason that the husband is entitled to his curtesy in both the legal and equitable real estate of the wife, though conveyed to her separate use.<sup>2</sup> But in those States where a wife may sell personal estate which is limited to her separate use, she may sell the income of real estate which is limited in the same manner; for the rents and profits may be disposed of without an express power, in the same manner as her personal estate.<sup>3</sup> So if an annuity, charged on land, is given to her separate use, she may sell it.<sup>4</sup> If a power of sale is given to her in the same instrument that conveys real estate to her separate use, she may exercise the power in the manner pointed out in the settlement, with or without the consent of her husband;<sup>5</sup> and equity compels her to execute such power, if she

<sup>1</sup> *Hopkins v. Myall*, 2 R. & M. 86; *Mant v. Leith*, 15 Beav. 526; *McClintic v. Ochiltree*, 4 W. Va. 249.

<sup>2</sup> *Peacock v. Monk*, 2 Ves. 192; *Dillon v. Grace*, 2 Sch. & L. 462; *Wright v. Cadogan*, 2 Eden, 257; Amb. 468; 2 Rop. Hus. & Wife, 185; 2 Story, Eq. Jur. § 138; *Shipp v. Bowmar*, 5 B. Mon. 163. But in New York a married woman may convey any interest in her lands without joining her husband, and it seems without acknowledging the deed; it being in the nature of an appointment. *Albany Fire Ins. Co. v. Bay*, 4 Comst. 9; *Lechmere v. Brotheridge*, 32 Beav. 353; *Taylor v. Meads*, 34 L. J. (N. s.) Ch. 203; 11 Jur. (N. s.) 166; *Adams v. Gamble*, 11 Ir. Eq. 269; 12 id. 103; see 11 Jur. (N. s.) 77; *Hall v. Waterhouse*, id. 361; *Ex parte Shirley*, 5 Bing. 226; *Harris v. Mott*, 14 Beav. 169; *Taylor v. Meads*, 10 Jur. (N. s.) 166; 4 De G., J. & S. 597.

<sup>3</sup> *Vizoneau v. Pegram*, 2 Leigh, 183.

<sup>4</sup> *Major v. Lansley*, 2 R. & M. 355.

<sup>5</sup> *Rippon v. Dawding*, Amb. 565; *Rich v. Beaumont*, 3 Bro. P. C. 308; *Tomlinson v. Dighton*, 1 P. Wms. 149; *Peacock v. Monk*, 2 Ves. 191; *Downes v. Timperon*, 4 Rus. 334; *Wright v. Cadogan*, 2 Eden, 239.

has for a valuable consideration entered into a contract to do so <sup>1</sup> (a)

§ 657. Intimately connected with the right of a married woman to dispose of her separate estate, is the right or power of such *feme covert* to contract debts, and charge her separate estate, either by specific agreements in relation to it, or by general engagements. In England, the courts have determined that if a married woman, having property to her separate use, binds herself by a written instrument to pay a sum of money, the implication of law is, that she intended to charge her separate estate, although she makes no reference, direct or indirect, to such separate estate; for, otherwise, the instrument is without meaning and nugatory, she having no power to make such an instrument except as a charge upon her separate estate. Therefore, if a married woman executes a bond,<sup>2</sup> even to her husband,<sup>3</sup> or joins her husband or other person in executing a bond,<sup>4</sup> or signs a promissory

<sup>1</sup> Dowell v. Dew, 12 L. J. (N. S.) Ch. 158; 1 Y. & C. Ch. 345; 7 Jur. 117.

<sup>2</sup> Lillia v. Airey, 1 Ves. Jr. 277; Norton v. Turvill, 2 P. Wms. 144; Peacock v. Monk, 2 Ves. 193; Tullett v. Armstrong, 4 Beav. 323.

<sup>3</sup> Heatley v. Thomas, 15 Ves. 596.

<sup>4</sup> Ibid.; Stanford v. Marshall, 2 Atk. 68; Hulme v. Tenant, 1 Bro. Ch. 20; 1 Lead. Cas. Eq. 398, notes.

(a) As to a wife's reversion, in *Re Bellamy*, 25 Ch. D. 620, 624, Kay, J., after reviewing the decisions, said: "I must take it to be settled that a vested reversionary interest, subject to a life-estate in leasehold property, which might by possibility come into possession during the coverture, is no longer treated as a mere possibility which is unassignable, but it is like any other chattel real of the wife in this respect at least; namely, that the husband can assign it during the coverture, and while it is still reversionary."

A married woman may be estopped by acts *in pais* in cases involving her equitable title to real estate. *Le Coil v. Armstrong* L. H. Co., 140 Ind. 256; *Hamlen v. Bennett*, 52 N. J. Ch. 70; *Branch v. Ward*, 114 N. C. 148; *Snow v. Hutchins*, 160 Mass. 111. This is limited, however, to fraudulent conduct. *Wetherbee v. Farrar*, 97 N. C. 106; *Rush v. Dilks*, 43 Hun. 282; *Chaffe v. Watts*, 37 La. Ann. 324; *Gray v. Crockett*, 35 Kansas, 66; *Ingalls v. Ferguson*, 59 Mo. App. 299.



note,<sup>1</sup> or bill of exchange,<sup>2</sup> or takes a lease agreeing to pay rent,<sup>3</sup> or gives a written retainer to a solicitor,<sup>4</sup> or if she enters into a written contract to purchase an estate,<sup>5</sup> her separate estate will be bound to make good her contract, and it may be reached by proper proceedings, though she is not liable personally;<sup>6</sup> and it is not necessary that her contract should refer to her separate estate, or that the other party should know that she was a married woman.<sup>7</sup> Where a single woman signed a bond, and afterwards property was settled upon her at marriage, to her separate use, the holder of the bond filed his bill to have the bond paid out of her separate estate, and, the husband having absconded, the decree was made.<sup>8</sup>

§ 658. The principles upon which the general contracts of married women have been held to create charges or liabilities to be answered out of their separate estates have been the subject of much controversy and discussion. Thus it was held by high authority, that every dealing of a married woman in relation to her separate estate must be in the nature of an appointment, or a disposition; and that a married woman cannot enter into general contracts, and therefore she cannot bind her separate estate by general engage-

<sup>1</sup> *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112; *Tullett v. Armstrong*, 4 Beav. 323; *Fitzgibbon v. Blake*, 3 Ir. Eq. 328.

<sup>2</sup> *Ibid.*; *Stuart v. Kirkwall*, 3 Madd. 387; *Coppin v. Gray*, 1 Y. & C. Ch. 205; *Owen v. Homan*, 4 H. L. Cas. 997.

<sup>3</sup> *Gaston v. Frankum*, 2 De G. & Sm. 561; 16 Jur. 507; *Master v. Fuller*, 4 Bro. Ch. 19; 1 Ves. Jr. 513.

<sup>4</sup> *Murray v. Barlee*, 4 Sim. 82; 3 Myl. & K. 209. But if the business relates to her husband's affairs, or to her children's, and not to her separate estate, her mere employment of a solicitor will not create a charge against her estate. *Callow v. Howle*, 1 De G. & Sm. 531; *Re Pugh*, 17 Beav. 336.

<sup>5</sup> *Dowling v. Maguire, Llo. & Goo. t. Plunket*, 1; but see *Chester v. Platt*, Sugd. V. & P. 173.

<sup>6</sup> *Syke's Trust*, 2 John. & Hem. 415; *Croft v. Middleton*, 2 K. & J. 194; 2 Jur. (N. S.) 528.

<sup>7</sup> *Dowling v. Maguire, Llo. & Goo. t. Plunket*, 1.

<sup>8</sup> *Briscoe v. Kennedy*, cited 1 Bro. Ch. 17.

ments.<sup>1</sup> It is now, however, well established in England, that a married woman may contract in relation to her separate estate, and that her contracts are not in the nature of appointments, or sales of her separate estate.<sup>2</sup> (a) If a mar-

<sup>1</sup> *Bolton v. Williams*, 2 Ves. Jr. 142; *Whistler v. Newman*, 4 Ves. 145; *Greatly v. Noble*, 3 Madd. 94; *Stuart v. Kirkwall*, id. 389; *Aguilar v. Aguilar*, 5 Madd. 418; *Field v. Sowle*, 4 Russ. 114; *Chester v. Platt*, Sugd. V. & P. 173 (13th ed.); *Murray v. Barlee*, 4 Sim. 82; *Digby v. Irving*, 6 Ir. Eq. 149.

<sup>2</sup> *Owen v. Dickenson*, 1 Cr. & Phil. 53; *Dowling v. Maguire*, Plunket, 19; *Master v. Fuller*, 4 Bro. Ch. 19; *Stead v. Nelson*, 2 Beav. 245; *Bailey v. Jackson*, C. P. Coop. 495; *Francis v. Wigzell*, 1 Madd. 261; *Crosby v. Church*, 3 Beav. 489; *Tullett v. Armstrong*, 4 Beav. 323.

(a) A married woman's contract is valid only as to her separate estate, both at law and in equity. *Frazee v. Frazee*, 79 Md. 27; 23 Atl. 1105; *Filler v. Tyler*, 91 Va. 458; *Valentine v. Bell*, 66 Vt. 280; *Godfrey v. Megahan*, 38 Neb. 748; *Pickens v. Kniseley*, 36 W. Va. 794; *Shelton v. Hadlock*, 62 Conn. 143; *Mendenhall v. Leivy*, 45 Mo. App. 20; *Prentiss v. Paisley*, 25 Fla. 927; *Reed v. Buys*, 44 Mich. 80. She can properly appoint an agent only as to such estate. *Macfarland v. Heim*, 127 Mo. 327. A confessed judgment is a contract within this rule. See *Turner v. State*, 92 Ala. 53. Such contracts, being void, cannot be made valid by ratification after the husband's decease. *Davis v. Schmidt* (Ind.), 31 N. E. Rep. 840; *Nesbitt v. Turner*, 7 Kulp (Penn.), 41. After marriage a wife cannot ratify her invalid contract made before marriage. *Saulsbury v. Corwin*, 40 Mo. App. 373. But coverture does not prevent a married woman from ratifying her covenant made when she was an infant. *In re Hodson's Settlement*, [1894] 2 Ch. 421.

In general, a married woman's

contracts can be enforced only against property which formed part of her separate estate at the date of the contract. *Pike v. Fitzgibbon*, 17 Ch. D. 454; 14 id. 837; *King v. Lucas*, 23 Ch. D. 712. See *Flower v. Buller*, 15 Ch. D. 665. The statement of claim upon her contract must allege that she has separate estate. *Tetley v. Griffith*, 57 L. T. 673; 36 W. R. 96. In South Carolina, in a suit upon a wife's contract, an allegation that the contract relates to her separate estate is unnecessary when the disability of coverture does not appear upon the complaint. *Brice v. Miller*, 35 S. C. 537.

In *Beck v. Pierce*, 23 Q. B. D. 316, it was held that an unsatisfied judgment at law against a wife's separate estate was not a bar to a suit for the wife's debt contracted before marriage against her husband who had received with her assets sufficient to pay the debt. See *Johnstone v. Browne*, 18 L. R. Ir. 428. A judgment against a married woman she is not personally liable to pay after her husband's death, so as to warrant a bankruptcy notice

ried woman can charge her separate estate only by some contract in the nature of an appointment, then a *written* instrument is necessary to constitute a valid appointment; but if the general contracts of a married woman are valid contracts to be paid out of her separate estate, then there is no distinction in principle between *written* and *verbal* contracts in that respect; and it is now substantially settled that the *verbal* contracts of a married woman are equally binding upon her separate estate.<sup>1</sup> But a parol contract will not bind a

<sup>1</sup> Murray v. Barlee, 3 M. & K. 223; Clinton v. Willes, 1 Sugd. Pow. 208, n.; Owens v. Dickenson, 1 Cr. & Phil. 53; Vaughn v. Vanderstegen,

against her thereon. *In re* Hewett, [1895] 1 Q. B. 328. A court of equity will not set aside a judgment by default against a married woman upon a note to which she might have pleaded coverture. Evans v. Calman, 92 Mich. 427; Yeatman v. Bellmain, 74 Tenn. 488.

Signing a joint note with her husband is *prima facie* evidence of the wife's intention to charge her separate estate. Nelson v. McDonald, 80 Wis. 605; see Schofield v. Jones, 85 Ga. 816; Atkinson v. Weidner, 83 Mich. 412. A promissory note given by the wife to her husband's copartnership is void as between the original parties, and equity cannot afford relief. Clark v. Patterson, 158 Mass. 388; Rahway Bank v. Brewster, 49 N. J. Eq. 231. A bond executed by a wife as surety for her husband's debt binds her separate estate. Williamson v. Cline, 40 W. Va. 194.

Family expenses are not chargeable to the wife's separate estate. Baker v. Carter, 83 Maine, 132; Meads v. Martin, 84 Mich. 306; Towles v. Owsley, 44 Mo. App. 436; Harrison v. Hill, 37 Ill. App. 30; Harmon v. Siler, 99 Ala. 306; Rob-

ertson v. Claskey, 64 Hun, 634; Howe v. North, 69 Mich. 272; 33 Cent. L. J. 186. A married woman's funeral expenses are primarily chargeable to her separate estate. Morrissey v. Mulhern, 168 Mass. 412. In Skinner v. Tirrell, 159 Mass. 474, a husband was held not liable by subrogation to one who loaned money to his wife to buy necessities. See Anderson v. Cullen, 8 N. Y. S. 643; Leuppie v. Osborn (N. J.), 39 Cent. L. J. 187, note; Kenyon v. Farris, 47 Ct. 510; Keener on Quasi-Contracts, 341-353.

The respective rights of husband and wife in their personal property are determined by the law of their matrimonial domicile. Parrett v. Palmer (Ind.), 35 N. E. Rep. 713. A married woman's contract, if valid in the State where it is made, is valid in another State, even though such contract would be invalid if there executed. Robinson v. Queen, 87 Tenn. 445; Holmes v. Reynolds, 55 Vt. 39; see Ruhe v. Buck, 124 Mo. 178; Hayden v. Stone, 13 R. I. 106; Dulin v. McCaw, 39 W. Va., 721; Read v. Brewer (Miss.), 16 So. Rep. 350.

married woman where the statute of frauds requires it to be in writing;<sup>1</sup> nor is the enforcement of the general engagement of a married woman, out of her separate estate, in the nature of a proceeding for the specific performance of a contract.<sup>2</sup>

§ 659. But while the general engagements of a married woman are not in the nature of appointments of her separate estate, yet in making those engagements the married woman must have a general intention that such contracts shall be satisfied out of her separate estate, or they cannot be enforced against either her or her property. Thus the torts of a married woman cannot be satisfied out of her separate property, because there can be no intention to create a charge upon her estate. So where there is no contract that implies such an intention, there can be no proceeding against her separate estate. Thus, where an annuity was charged on her separate estate, and was set aside for non-compliance with some rule of law, it was held that the purchase-money of the annuity could not be recovered back out of her separate estate, because it had never been in the contemplation of either party that the purchase-money should be paid back, and, as there was no contract, there could have been no intention of charging her separate estate.<sup>3</sup> And where a married woman had received money, claiming it as her own, it could not be recovered back from her separate estate; for there had never been

2 Dr. 183; *Wright v. Chard*, 4 Dr. 673; *Newcomen v. Hassard*, 1 Ir. Eq. 274; *Blatchford v. Woolley*, 2 Dr. & Sm. 204; *Shattock v. Shattock*, L. R. 2 Eq. 182.

<sup>1</sup> *Syke's Trust*, 2 John. & H. 415.

<sup>2</sup> In *Burke v. Tuite*, 10 Ir. Eq. 467, it was held that contracts of a wife not in writing could not be satisfied out of her real estate, because such a contract created an interest in land. This would be so if the contract was in the nature of an appointment. And see *Shattock v. Shattock*, L. R. 2 Eq. 192; *Johnson v. Gallagher*, 2 De G., F. & J. 514.

<sup>3</sup> *Jones v. Harris*, 9 Ves. 486; *Aguilar v. Aguilar*, 5 Madd. 414; *Bolton v. Williams*, 4 Bro. Ch. 297; 2 Ves. Jr. 138; *Johnson v. Gallagher*, 3 De G., F. & J. 593; *Shattock v. Shattock*, L. R. 2 Eq. 182; *Callow v. Howle*, 1 De G. & Sm. 531.

an intention of paying it back at all.<sup>1</sup> It is difficult to reconcile all the English authorities. The common-law principle is, that a married woman can make no valid or binding contract. This principle is recognized in equity; and all the cases hold that a married woman can make no contract valid and binding upon herself personally; consequently that no judgment or decree can be made against her personally: that her contracts can be satisfied only out of her property, and that they can be satisfied out of her property only when she contracts upon the faith and credit of her separate property. The whole position is anomalous, and has been produced by the conflicting practices of courts of law and courts of equity.<sup>2</sup> Lord Justice Turner stated the true principles, thus far established, as follows: "In order to bind her separate estate by a general engagement, it should appear that the engagement was made with reference to and upon the faith and credit of that estate; and the question whether it was so or not is to be judged of by the court, upon all the circumstances of the case."<sup>3</sup>

§ 660. It is thus established in England, that a wife's general contracts may be satisfied out of her separate estate, if they were entered into with reference to, or upon the faith and credit of, such estate; and that the contract of a married woman, being a nullity unless made with reference to her separate estate, will be presumed by the court, unless something else appears, to be made in reference to her separate estate, and therefore binding upon it.<sup>4</sup> This rule has been

<sup>1</sup> *Wright v. Chard*, 4 Dr. 673.

<sup>2</sup> Vice-Chancellor Kindersley considers the law in a transition state, and not yet established clearly in all points; and says, "that the tendency is, having put a married woman in the position of a single woman in relation to her separate property, to carry that position to its fullest extent, short of making her personally responsible." *Wright v. Chard*, 4 Dr. 685.

<sup>3</sup> *Johnson v. Gallagher*, 3 De G., F. & J. 515, approved in *Leeds Banking Co.*, 12 Jur. (N. S.) 984.

<sup>4</sup> *Ante*, §§ 657-659.

sanctioned and adopted in the States of Connecticut,<sup>1</sup> Maryland,<sup>2</sup> Alabama,<sup>3</sup> Kentucky,<sup>4</sup> North Carolina,<sup>5</sup> Missouri,<sup>6</sup> Florida,<sup>7</sup> and Georgia.<sup>8</sup> In New York, Chancellor Kent held that a married woman is not to all intents and purposes a single woman in regard to her separate estate, but only so far as the instrument of settlement or trust makes her a single woman; and instead of holding that she has the full power of a single woman over her separate estate, unless restrained by the instrument of trust, the distinguished chancellor held that she has no power unless it is specially given; that her incapacity is the general rule, and the exception is to be strictly shown in every case.<sup>9</sup> But this doctrine was overruled on appeal;<sup>10</sup> and a modified rule has

<sup>1</sup> *Imlay v. Huntington*, 20 Conn. 149; *Wells v. Thorman*, 37 Conn. 319; *Donald v. Plumb*, 8 Conn. 447; *Leavitt v. Beirne*, 21 Conn. 1.

<sup>2</sup> *Chew v. Beall*, 13 Md. 348; *Cook v. Husbands*, 11 Md. 492. The early cases, *Tarr v. Williams*, 4 Md. Ch. 68; *Williams v. Donaldson*, id. 414; and *Miller v. Williamson*, 5 Md. 219, were the other way; but the last case, 11 Md. 492, seems to establish the English rule. *Jackson v. West*, 22 Md. 21.

<sup>3</sup> *Ozley v. Ikelheimer*, 26 Ala. 382; *Forrest v. Robinson*, 4 Porter, 44; *Saddler v. Houston*, id. 208; *Bradford v. Greenway*, 17 Ala. 797; *Puryear v. Beard*, 14 Ala. 122; *Puryear v. Puryear*, 16 Ala. 486; *Collins v. Lavenberg*, 19 Ala. 682; *Sprague v. Tyson*, 44 Ala. 338.

<sup>4</sup> *Bell v. Kellar*, 13 B. Mon. 381; *Lillard v. Turner*, 16 id. 374; *Coleman v. Woolley*, 10 id. 320; *Jarmon v. Wilkinson*, 7 id. 293. In *Burch v. Breckenridge*, 16 B. Mon. 482, it was held that the general contract of a married woman could not be enforced against her separate real estate, unless it was in writing. *Long v. White*, 5 J. J. Marsh. 226. Now altered by Rev. Stat. c. 47, § 17; *Daniel v. Robinson*, 18 B. Mon. 301; *Williamson v. Williamson*, id. 329-385; *Stocker v. Whitlock*, 3 Met. 244; *Hanley v. Downing*, 4 Met. 95.

<sup>5</sup> *Harris v. Harris*, 7 Ired. Eq. 311; *Frazier v. Brownlow*, 3 id. 287; *Newlin v. Freeman*, 4 id. 312.

<sup>6</sup> *Whitesides v. Carman*, 23 Mo. 457; *Segond v. Garland*, id. 547; *Coats v. Robinson*, 10 Mo. 757; *Clafin v. Van Wagoner*, 30 Mo. 252.

<sup>7</sup> *Lewis v. Yale*, 4 Fla. 418.

<sup>8</sup> *Wylly v. Collins*, 9 Ga. 223; *Roberts v. West*, 15 Ga. 123; *Fears v. Brooks*, 12 Ga. 195; *Weeks v. Sego*, 9 Ga. 201.

<sup>9</sup> *Methodist Church v. Jaques*, 3 Johns. Ch. 78.

<sup>10</sup> Cases cited in last note; 17 Johns. 548-585; *Dyett v. Coal Co.*, 7 Paige, 9; 20 Wend. 570; *Powell v. Murray*, 2 Edw. Ch. 636; *Wadham*

been acted upon, which concedes the power of the married woman to contract debts to be satisfied out of her separate estate, unless restrained by the instrument of conveyance, but limits her power to a power of contracting in relation to her separate estate, or for the benefit of such estate, or for her own personal benefit upon the faith and credit of such estate.<sup>1</sup> By this rule her general engagements, which have no reference at the time to her separate estate, or to her own benefit, cannot be enforced against such separate property.<sup>2</sup> In Virginia, the weight of authority seems to be in favor of the English rule.<sup>3</sup> In Vermont, the rule is substantially the same as the doctrine followed in New York.<sup>4</sup> In Wisconsin, the rule is substantially the same as the doctrine followed in New York.<sup>4</sup> In Wisconsin, the rule is substantially the same as in New York.<sup>5</sup> And so in New Jersey.<sup>6</sup>

§ 661. In Pennsylvania, the doctrine held by Chancellor Kent, in the case of *Methodist Church v. Jaques*, has been fully adopted and firmly settled by the courts. By the practice in that State, a married woman cannot sell, convey, alienate, or in any way charge her separate estate, unless

*v. Society, &c.*, 2 Kern. 415; *Albany Ins. Co. v. Bay*, 4 Comst. 9; *Cruger v. Cruger*, 5 Barb. 227; 10 Barb. 597.

<sup>1</sup> *Ibid.*; *Gardner v. Gardner*, 7 Paige, 112; *Cumming v. Williamson*, 1 Sandf. 17; *Dickerman v. Abrahams*, 21 Barb. 551; *Coon v. Brook*, *id.* 546.

<sup>2</sup> *Curtis v. Engel*, 2 Sand. 287; *Knowles v. McCamley*, 10 Paige, 343; *Vanderheyden v. Mallory*, 3 Barb. Ch. 10; 1 Comst. 453; *Yale v. Dederer*, 18 N. Y. 265; 22 N. Y. 456, overruling *s. c.* 21 Barb. 286; *L'Amoureux v. Van Rensselaer*, 1 Barb. Ch. 34; *Rogers v. Ludlow*, 3 Sand. 104; *Corn Exchange v. Babcock*, 57 Barb. 222, 231; *Heywood v. City of Buffalo*, 14 N. Y. 540; *Barnett v. Lichtenstein*, 39 Barb. 194; *Kelso v. Tabor*, 52 Barb. 125; *White v. McNutt*, 33 N. Y. 371; *Noyes v. Blakeman*, 3 Sand. 531.

<sup>3</sup> *Nixon v. Rose*, 12 Grat. 425; *Woodson v. Perkins*, 5 *id.* 346. But *Tucker, P.*, in *Williamson v. Beekman*, 8 Leigh, 20, expressed a different opinion.

<sup>4</sup> *Frary v. Booth*, 37 Vt. 78; *Partridge v. Stocker*, 36 Vt. 108.

<sup>5</sup> *Todd v. Lee*, 15 Wis. 365; 16 Wis. 480.

<sup>6</sup> *Perkins v. Elliott*, 23 N. J. Eq. 526.

such power is expressly given to her in the deed of trust or settlement. Therefore no contract made by her, whether it is a general engagement by bond, note, or bill of exchange, or a special contract in relation to her separate estate, is valid, and it cannot be enforced in any manner.<sup>1</sup> In South Carolina, in the case of *Ewing v. Smith*,<sup>2</sup> the English rule was at first established; but the decision in that case was reversed, and the rule, as held in Pennsylvania, was laid down and is now steadily acted on.<sup>3</sup> But a contract, whether made by the wife or trustee, for the protection, preservation, or benefit of the trust estate, or in furtherance of the purposes of the trust, can be enforced.<sup>4</sup> The rule, as held in Pennsylvania and South Carolina, is also held in Rhode Island,<sup>5</sup> Tennessee,<sup>6</sup> and Mississippi.<sup>7</sup> In New Hampshire, her separate estate is not bound by a general engagement,<sup>8</sup> nor is it in Massachusetts.<sup>9</sup>

§ 662. No action at law can be maintained upon her contracts against a married woman personally, although she is entitled to the beneficial interests of property in trust for her

<sup>1</sup> *Lancaster v. Dolan*, 1 Rawle, 231; *Lyne v. Crouse*, 1 Penn. St. 111; *Rogers v. Smith*, 4 id. 93; *Thomas v. Folwell*, 2 Whart. 11; *Dorance v. Scott*, 3 Whart. 309; *Wallace v. Coston*, 9 Watts, 137.

<sup>2</sup> *Ewing v. Smith*, 3 Des. 417.

<sup>3</sup> *Ibid.*; *Frazier v. Center*, 1 McCord, Ch. 270; *Magwood v. Johnston*, 1 Hill, Ch. 228; *Robinson v. Dart*, Dudl. Eq. 128; *Clark v. Makenna*, Cheves, Eq. 163; *Reid v. Lamar*, 1 Strob. Eq. 27; *Rachell v. Tompkins*, id. 114; *Adams v. Mackey*, 6 Rich. Eq. 75; *Mayer v. Galluchat*, id. 1; *Brown v. Postall*, 4 Rich. Eq. 71.

<sup>4</sup> *Cater v. Eveleigh*, 4 Des. 19; *James v. Mayrant*, id. 591; *Montgomery v. Eveleigh*, 1 McCord, 267; *Magwood v. Johnston*, 1 Hill, Ch. 228; *Clark v. Makenna*, Cheves, Eq. 163; *Reid v. Lamar*, 1 Strob. Eq. 27; *Rachell v. Tompkins*, id. 114; *Adams v. Mackey*, 6 Rich. Eq. 75.

<sup>5</sup> *Metcalf v. Cook*, 2 R. I. 355.

<sup>6</sup> *Ware v. Sharp*, 1 Swan, 489; *Morgan v. Elam*, 4 Yerg. 375; *Marshall v. Stevens*, 8 Humph. 159; *Litton v. Baldwin*, id. 209.

<sup>7</sup> *Armstrong v. Stoval*, 26 Miss. 275; *Dotey v. Mitchell*, 9 Sm. & M. 435; *Montgomery v. Agricultural Bank*, 10 Sm. & M. 567; *Dickson v. Miller*, 11 id. 594; *Prewett v. Land*, 36 Miss. 495.

<sup>8</sup> *Bailey v. Pearson*, 29 N. H. 77.

<sup>9</sup> *Willard v. Eastman*, 15 Gray, 328; *Rogers v. Ward*, 8 Allen, 388.



sole and separate use; nor can a bill in equity be filed against a married woman as a sole defendant in order to make her personally liable. There is no case in which a court has made a personal decree against a married woman. She may make her separate property answerable for her engagements; but where her trustees are not made parties to a bill, and no particular fund is sought to be charged, but only a personal decree is sought against her, the bill cannot be sustained.<sup>1</sup> But the party claiming a debt must file a bill against her and *her trustees*, and must pray payment of his demand out of her personal estate in the hands of trustees, to which she is absolutely entitled, and also out of the income of her real estate, including *arrears* of rent and accruing interest or rents, if there is no clause against anticipation, until the claim and costs have been satisfied.<sup>2</sup> The death of the husband, either before or while the suit is pending, will not defeat it, nor change its character; for although the death of the husband puts an end to the separate use, and gives the woman an entire and perfect right of dealing as a single woman, yet, if the contracts were made while she was married, no judgments or decrees can ever be entered against her personally; for at law such contracts have no validity, and the death of the husband does not give them a validity which they cannot otherwise have.<sup>3</sup> Determined cases go thus far, that the general engagements of the wife operate upon her personal property, and upon the rents and profits of her real estate, and her trustees are obliged to apply her personal estate, and the rents and profits of real estate when they arise, to the satisfaction of such general engagements; but courts do not use any *direct* processes against the separate estate of the wife, and the manner of reaching her separate

<sup>1</sup> Sir T. Plumer, in *Francis v. Wigzell*, 1 Madd. 262.

<sup>2</sup> *Hulme v. Tenant*, 1 Bro. Ch. 20; *Stanford v. Marshall*, 2 Atk. 68; *Murray v. Barlee*, 4 Sim. 82; 3 M. & K. 209; *Field v. Sowle*, 4 Russ. 112; *Nantes v. Corrock*, 9 Ves. 182; *Jones v. Harris*, id. 492; *Bullpin v. Clarke*, 17 Ves. 365; *Stuart v. Kirkwall*, 3 Madd. 387; *Robertson v. Johnson*, 36 Ala. 197.

<sup>3</sup> *Field v. Sowle*, 4 Russ. 112; *Heatly v. Thomas*, 15 Ves. 596; *Kenge v. Delavall*, 1 Vern. 326.

property is by decree to bind the trustees to apply the personal estate in their hands, and the rents and profits of the real estate, according to the justice of the engagement to be carried into effect. There is no case where the remedy against the wife has been carried to the extent of decreeing that the trustees shall sell or mortgage her separate real estate to raise money to meet her general engagements.<sup>1</sup> But Mr. Lewin thinks that if the instrument of trust is so worded as to place the entire interest and inheritance of the real estate at her disposal, the general engagements of the wife may bind the whole *corpus* of the real estate, whether *corpus* or *income*.<sup>2</sup> In all proceedings to enforce the general engagements of a married woman upon her separate property, it must be remembered that such engagements are enforced in equity, not because a married woman can make a valid contract in law or equity, but because in justice and equity a married woman's honest engagements ought to be answered.<sup>3</sup> Of course the propositions of this section apply only in those States where the English doctrine prevails. They have no application in those States where a married woman can make no charge upon her separate estate not specially authorized in the instrument of settlement.

§ 663. Two conflicting principles are struggling in the courts: one is, that the engagements of the wife are charges on her separate property, equivalent to so many assignments or appointments, to be satisfied out of her separate property in the order of their date;<sup>4</sup> the other is, that the wife's general contracts are not charges, but create a liability, the remedy for which, if the woman is single, is against the person; but if she is married, there is no remedy against the person, but the law gives an equitable execution against her

<sup>1</sup> *Per* Lord Thurlow in *Hulme v. Tenant*, 1 Bro. Ch. 20; *Broughton v. James*, 1 Coll. 26; *Nantes v. Carrock*, 9 Ves. 189.

<sup>2</sup> *Lewin on Trusts*, 548, 552.

<sup>3</sup> *Cummins v. Sharpe*, 21 Ind. 331; *Pentz v. Simonson*, 13 N. J. Eq. 232; *Glass v. Warwick*, 40 Pa. St. 140. But see *Maclay v. Love*, 25 Cal. 367; *Hanly v. Downing*, 4 Met. (Ky.) 95.

<sup>4</sup> *Shattock v. Shattock*, L. R. 2 Eq. 182.

separate property. On this last principle, which is the one generally adopted, her separate property is liable, *pari passu*, as assets.<sup>1</sup> The remedy being wholly equitable, the statute of limitations does not apply to a proceeding against the separate property of the married woman;<sup>2</sup> and in case the nature of the property is such that the legal title to it cannot be reached by a legal execution, the equitable interest cannot be reached by a decree in equity.<sup>3</sup> Thus if there has been a *bona fide* assignment, or conveyance, or mortgage to a purchaser,<sup>4</sup> or if there is a clause in the settlement against anticipation,<sup>5</sup> the equitable execution cannot reach the property. Nor can charges after her decease be imposed upon her separate estate; and as a husband is bound to bury his wife, it would seem that her separate estate could not be made liable for her funeral expenses.<sup>6</sup>

§ 664. The savings and accumulations by a married woman, out of her separate estate, are governed by the same rules as the separate estate itself, as "the sprout is to savor of the root and go the same way."<sup>7</sup> The same rule applies to the savings out of an allowance for maintenance on separation.<sup>8</sup> But savings out of money given by the husband to the wife for household and personal purposes belong to the husband.<sup>9</sup>

<sup>1</sup> Anon., 18 Ves. 258; *Johnson v. Gallagher*, 3 De G., F. & J. 520.

<sup>2</sup> *Norton v. Turville*, 2 P. Wms. 144; *Vaughan v. Walker*, 6 Ir. Ch. 471; 8 id. 458.

<sup>3</sup> *Nantes v. Carrock*, 9 Ves. 182.

<sup>4</sup> *Johnson v. Gallagher*, 3 De G., F. & J. 520.

<sup>5</sup> *Murray v. Barlee*, 4 Sim. 95.

<sup>6</sup> *Gregory v. Lockyer*, 6 Madd. 90.

<sup>7</sup> *Gore v. Knight*, 2 Vern. 535; *Malony v. Kennedy*, 19 Sim. 254; *Humphrey v. Richards*, 2 Jur. (N. S.) 432; *Barron v. Barron*, 24 Vt. 375; *Churchill v. Dibben*, 9 Sim. 447, n.; 2 *Kenyon*, 85; *Messenger v. Clarke*, 5 Exch. 392; *Merritt v. Lyon*, 3 Barb. 110; *Hoot v. Sorrell*, 11 Ala. 386; *Kee v. Vasser*, 2 Ired. Eq. 553; *Gentry v. McReynolds*, 12 Mo. 533; *Yardley v. Raub*, 5 Whart. 123; *Towers v. Hagner*, 3 id. 57; *Young v. Jones*, 9 Humph. 551; *Rush v. Vought*, 55 Penn. St. 437; *Rogers v. Fales*, 5 id. 104; *Miller v. Williams*, 5 Md. 226, 236.

<sup>8</sup> *Brooke v. Brooke*, 25 Beav. 347; *Messenger v. Clarke*, 5 Exch. 388.

<sup>9</sup> *Barrack v. McCulloch*, 3 K. & J. 114; *Mews v. Mews*, 15 Beav. 529.

§ 665. If the husband and wife live together, and the husband receives from the trustees the income of the wife's separate estate, the wife or her representatives cannot claim to recover from the husband, or his estate, more than one year's income.<sup>1</sup> Whether one year's income can be recovered or not is a matter of great conflict of opinion and authority in England. There are many cases that hold that one year's income can be recovered,<sup>2</sup> and as many that it cannot.<sup>3</sup> Mr. Lewin says, that the better opinion is, independent of authority, that the wife can recover nothing; and he pertinently asks if she could recover anything of the trustees on the ground of a misapplication of the income. The principle is, that the court presumes the consent of the wife to the husband's receipt *de anno in annum*, and the wife's assent is presumed to continue until revoked by something expressed or implied.<sup>4</sup> If, therefore, the wife did not in fact consent, but required the separate income to be paid to herself, the court will give her the arrears out of her husband's estate, back to the time of her dissent.<sup>5</sup> But the court will not pay any attention to idle complaints not seriously insisted upon, but will demand very clear evidence of an earnest and per-

<sup>1</sup> *Payne v. Little*, 26 Beav. 1; *Ex parte Elder*, 2 Madd. 286 n.; *Brodie v. Barry*, 2 Ves. & B. 36; *Rowley v. Unwin*, 2 K. & J. 138.

<sup>2</sup> *Powell v. Hankey*, 2 P. Wms. 82; *Fowler v. Fowler*, 3 id. 353; *Squire v. Dean*, 4 Bro. Ch. 325; *Smith v. Camelford*, 2 Ves. Jr. 716; *Arthur v. Arthur*, 11 Ir. Eq. 511.

<sup>3</sup> *Burdon v. Burdon*, 2 Madd. 286; *Warwick v. Edwards*, 1 Eq. Cas. Ab. 170; *Thomas v. Bennett*, 2 P. Wms. 341; *Towushend v. Windham*, 2 Ves. 7; *Peacock v. Monk*, id. 190; *Aston v. Aston*, 1 Ves. 267; *Parker v. White*, 11 Ves. 225; *Brodie v. Barry*, 2 Ves. & B. 36; *Thrubbs v. Harman*, 3 M. & K. 513; *Lea v. Grundy*, 1 Jur. (N. S.) 953; *Corbally v. Grainger*, 4 Ir. Eq. 173; *Mackey v. Maturin*, 15 Ir. Eq. 150; *Howard v. Digby*, 2 Cl. & Fin. 643; 4 Sim. 601; *Arthur v. Arthur*, 11 Ir. Eq. 513; *Beresford v. Armagh*, 13 L. J. (N. S.) Ch. 235; *Caton v. Rideout*, 1 Mac. & G. 519; 2 H. & Tw. 55.

<sup>4</sup> *Lewin on Trusts*, 550; *Caton v. Rideout*, 2 H. & Tw. 41; *McGlinsey's App.*, 14 S. & R. 64; *Towers v. Hagner*, 3 Whart. 48; *Naglee v. Ingersoll*, 7 Penn. St. 204; *Yardley v. Raub*, 5 Whart. 123; *Methodist Church v. Jaques*, 3 Johns. Ch. 77.

<sup>5</sup> *Ridout v. Lewis*, 1 Atk. 269; *Moore v. Moore*, 2 Atk. 272; *Moore v. Scarborough*, 2 Eq. Cas. Ab. 156; *Parker v. Brooke*, 9 Ves. 583.

sistent claim on the part of the wife.<sup>1</sup> If the income has not come to the hands of the husband, but is still in the hands of a receiver, the acquiescence of the wife will not be presumed, and it will belong to her.<sup>2</sup> If the wife is insane or incapable of assenting, the husband's estate must account for the whole income received by him; but his estate will be allowed in equity for payments made for his wife's benefit which ought to have fallen upon her separate estate.<sup>3</sup> And the court may order the income of an insane woman's estate to be applied to her support where her husband is in indigent circumstances.<sup>4</sup> But there is a distinction between a married woman's separate estate and *pin-money* allowed to a wife for her personal use and ornament, and it has been held that there can be no claim upon the husband or his estate for any arrearages in such an allowance.<sup>5</sup> So there can be no claim upon his estate if the will directs the income to be paid to him.<sup>6</sup>

§ 666. If a husband receives the capital fund of his wife's separate property, there is no presumption that she intended to give or transfer it to him, but he is *prima facie* a trustee for her, and a gift from her to him will not be presumed without clear evidence;<sup>7</sup> and if he undertakes to act as trustee for his wife to invest her money, he will be held responsible as a stranger;<sup>8</sup> but if the husband uses the property in his business, or for the support of his family, with her

<sup>1</sup> Thrupp v. Harman, 3 M. & K. 512; Corbally v. Grainger, 4 Ir. Eq. 173.

<sup>2</sup> Foss v. Foss, 15 Ir. Ch. R. 215.

<sup>3</sup> Att. Gen. v. Parnter, 3 Bro. Ch. 441; 4 Brock. 409; Howard v. Digby, 2 Cl. & Fin. 671; Nettleship v. Nettleship, 10 Sim. 236.

<sup>4</sup> Erisman v. Directors of the Poor, 47 Penn. St. 509.

<sup>5</sup> Howard v. Digby, 2 Cl. & Fin. 634; 4 Sim. 588; 8 Bligh, N. P. 224; Aston v. Aston, 1 Ves. 267; Fowler v. Fowler, 3 P. Wms. 355; Barrack v. M'Culloch, 3 K. & J. 110; Miller v. Williams, 5 Md. 219, 231.

<sup>6</sup> Maston v. Barnard, 33 Ga. 520.

<sup>7</sup> Rich v. Cockell, 9 Ves. 369; Lamprey v. Watson, 43 Ala. 377; Marsh v. Marsh, id. 677; Richardson v. Stodder, 100 Mass. 528.

<sup>8</sup> Walker v. Walker, 9 Wall. 753.

knowledge and assent, a gift may be inferred in the absence of a contrary agreement.<sup>1</sup> But if there is an express agreement that the goods, furniture, or other property into which the wife's separate estate is converted by the husband, shall remain the property of the wife, her interest continues, and will be protected by the law;<sup>2</sup> or if the property still stands in the name of the trustee.<sup>3</sup> The mere concurrence of the wife in the receipt of a legacy by the husband, given to her separate use, is not a gift to him.<sup>4</sup>

§ 667. Where the absolute beneficial interest in the trust fund is given to the separate use of a married woman, without any restriction or direction as to the mode of possession or enjoyment, or in such manner that the statute of uses would execute the use or title in her, if it was real estate, she is entitled to call upon the trustees for an immediate conveyance or transfer of the legal title to her; and if they refuse, they will be decreed to convey with costs.<sup>5</sup> It is immaterial that the trust was created while she was single; for marriage has no effect upon her separate estate in that respect.<sup>6</sup> So where the absolute beneficial interest is subject to the control and alienation of the wife, the concurrence of the trustee is not necessary to the validity of an alienation by her, unless it is made requisite by the terms of the trust.<sup>7</sup> The trustees will be compelled to give legal effect to any such alienation by transferring the property,<sup>8</sup> even if it is a gift and transfer to the husband, or for his benefit;<sup>9</sup> for a

<sup>1</sup> *Gardner v. Gardner*, 1 Gif. 126; *McGlinsey's App.*, 14 S. & R. 64; *Shirley v. Shirley*, 9 Paige, 363.

<sup>2</sup> *Taggard v. Talcott*, 2 Edw. 628; *Shirley v. Shirley*, 9 Paige, 363; *Ashworth v. Outram*, 5 Ch. D. 923.

<sup>3</sup> *Yardley v. Raub*, 5 Whart. 117.

<sup>4</sup> *Rowe v. Rowe*, 2 De G. & Sm. 294; 12 Jur. 909.

<sup>5</sup> *Thorby v. Yartes*, 1 Y. & Coll. Ch. 438; *Taylor v. Glanville*, 3 Madd. 179.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Grigby v. Cox*, 1 Ves. 518; *Essex v. Atkins*, 14 Ves. 552; *Corgell v. Dunton*, 7 Barr, 532.

<sup>8</sup> *Marrick v. Grice*, 3 Nev. 52.

<sup>9</sup> *Stanford v. Marshall*, 2 Atk. 69; *Parker v. White*, 11 Ves. 209; *Essex v. Atkins*, 14 Ves. 542; *Hughes v. Wells*, 9 Hare, 749.

direct gift to the husband himself will be sustained if not made under the improper or undue influence of the husband.<sup>1</sup> The court will investigate the circumstances under which a gift is made to the husband; and if there appear to be any suspicious circumstances attending the gift, the court will refuse to carry it into effect.<sup>2</sup> If a married woman pledges or mortgages her separate estate for her husband's debts, she is entitled to all the rights of a surety against him, and to security for her liability out of his estate.<sup>3</sup> The wife cannot consent to a loan to the husband in the future: her consent must accompany the act.<sup>4</sup> If a trustee mortgage an estate for the purchase-money at the same time that he takes a legal title in trust, it will be a valid transaction.<sup>5</sup>

§ 668. A married woman has full power to dispose of her separate estate by will, or appointment in the nature of a will, unless restrained by the instrument of trust;<sup>6</sup> and her absolute equitable interests will be disposed of as directed in the will. And she may revoke her will.<sup>7</sup> Where the power to dispose of her estate is given to her by will, she need not refer to such will in her own will.<sup>8</sup> If she exceed the power

<sup>1</sup> *Freeman v. Moore*, 1 Bro. P. C. 237; *Frederic v. Hatwell*, 1 Cox, 193; *Parker v. White*, 11 Ves. 209; *Dallam v. Wampole*, 1 Pet. C. C. 116; *Nedby v. Nedby*, 5 De G. & S. 377; *Jaques v. Methodist Church*, 17 Johns. 548; *Whitall v. Clark*, 2 Edw. Ch. 149; *Cruger v. Cruger*, 5 Barb. 225; *Hoover v. Samaritan Soc.*, 4 Whart. 445; *Merriam v. Harsen*, 2 Barb. Ch. 232; *Woodward v. Woodward*, 3 De G., J. & Sm. 672; *Green v. Carlil*, 4 Ch. D. 882.

<sup>2</sup> *Pybus v. Smith*, 1 Ves. Jr. 189; *Nedby v. Nedby*, 5 De G. & S. 577.

<sup>3</sup> *Hudson v. Carmichael*, 23 L. J. Ch. 893; *Sheidle v. Weishlee*, 16 Penn. St. 184; *Neimawicz v. Gahn*, 3 Paige, 614; *Knight v. Whitehead*, 26 Miss. 246.

<sup>4</sup> *Child v. Child*, 20 Beav. 50; *Taylor v. Taylor*, 4 Jur. (N. S.) 1218.

<sup>5</sup> *Marrick v. Grice*, 3 Nev. 52.

<sup>6</sup> *Porcher v. Daniel*, 12 Rich. Eq. 349; *Fettiplace v. Gorges*, 1 Ves. Jr. 46; *Rich v. Cockell*, 9 Ves. 369; *Humphrey v. Richards*, 2 Jur. (N. S.) 432; *Moore v. Morris*, 4 Dr. 38.

<sup>7</sup> *Hawksley v. Barrow*, L. R. 1 P. & D. 147.

<sup>8</sup> *Porcher v. Daniel*, 12 Rich. Eq. 349; *In re Gratwick's Trusts*, L. R. 1 Eq. 177; *Att. Gen. v. Wilkinson*, L. R. 2 Eq. 816.

given her, her whole appointment will be void, and not the simple excess.<sup>1</sup> The usual course of administration will be observed in regard to such estates.<sup>2</sup> If she dies without disposing of her separate estate, her husband will take her equitable personal estate, in the same manner as he takes her legal personal estate. If administration is necessary to reach any part of her personal estate, he is entitled to administration, and will take the property to his own use; or if another person is appointed administrator, such administrator must pay over the proceeds to the husband on final settlement.<sup>3</sup>

§ 669. Where a married woman procures or induces the trustee to commit a breach of trust, which results in the loss of the fund in which she has an interest to her separate use, the court treats her act as an alienation of the estate, so far as she had power to bind it.<sup>4</sup> (a) So where a married woman,

<sup>1</sup> *In re Brown's Trusts*, L. R. 1 Eq. 74.

<sup>2</sup> *Norton v. Turvill*, 2 P. Wms. 144; *Tatham v. Drummond*, 2 Hem. & Mill. 262.

<sup>3</sup> *Prandly v. Fielder*, 2 M. & K. 57; *Molony v. Kennedy*, 10 Sim. 254; *Bird v. Peagram*, 13 C. B. 639; *Johnstone v. Lumb*, 15 Sim. 308; *Drury v. Scott*, 4 Y. & C. 264; *Stead v. Clay*, 1 Sim. 204; *Stewart v. Stewart*, 7 Johns. Ch. 229; *McKenna v. Phillips*, 6 Whart. 576; *Brown v. Brown*, 6 Humph. 127; *Rogers v. White*, 1 Sneed, 60; *Cox v. Coleman*, 13 B. Mon. 453; *Brown v. Alden*, 14 id. 141; *Farie's App.* 23 Penn. St. 29; *McCosker v. Golden*, 1 Brad. Sur. 64.

<sup>4</sup> *Crosby v. Church*, 3 Beav. 485; *Hanchett v. Briscoe*, 22 Beav. 496. But see *Whistler v. Newman*, 4 Ves. 129, and observations of Lord Eldon on it in *Parker v. White*, 11 Ves. 223; *Brewer v. Swirley*, 2 Sm. & Gif. 219; *Hughes v. Mills*, 9 Hare, 772, 773; *Mara v. Manning*, 2 Jones & Lat. 311.

(a) In England, a married woman's separate estate will not, it seems, be charged on the mere ground of her having acquiesced in or approved of a breach of trust. *Sawyer v. Sawyer*, 28 Ch. D. 595, 605. But in such a case the husband is liable if she has been only negligent and is not chargeable with active misconduct. *Bahin v. Hughes*, 31 Ch. D. 390. In *Franklin's Appeal*, 115 Penn. St. 534, it was held that, in the absence of compulsion, her estate is liable for her breach of trust. Statutes enlarging the wife's rights and powers do not, without



as a trustee, had wasted the trust estate, the ordinary right of retainer may be exercised against her separate estate under the *same* instrument.<sup>1</sup> So if she misemploys or misapplies any of the trust property, her own interests under the *same* instrument may be held to make good the loss.<sup>2</sup> But if there is a clause against anticipation in the instrument, no such remedy can be applied.<sup>3</sup>

§ 670. A married woman may be restrained by the terms of the trust from alienating or anticipating the income of her separate estate, during her present or any future coverture. The validity of such restraints is now well established.<sup>4</sup> The courts did not sustain the doctrine until the words of the restriction became so explicit that there was no escape, except in declaring such restrictions illegal.<sup>5</sup> Thus if the limitation is simply to her sole and separate use,<sup>6</sup> or to pay from time to time upon her receipt under her own proper hand,<sup>7</sup> or upon her personal appearance,<sup>8</sup> the wife is left at

<sup>1</sup> *Pemberton v. McGill*, 1 Dr. & Sm. 266.

<sup>2</sup> *Clive v. Carew*, 1 John. & H. 199.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Jackson v. Hobhouse*, 2 Mer. 488; *Parker v. White*, 11 Ves. 221; *Tullett v. Armstrong*, 1 Beav. 23; 4 M. & Cr. 393; *Jollands v. Burdett*, 33 L. J. Ch. 471; 2 De G., J. & S. 79. The trust must be for a married woman, or in contemplation of her marriage. *Pickering v. Coates*, 10 Phila. 65; *Snyder's App.*, 92 Penn. St. 504. A lapse of a year between its execution and her marriage is not sufficient to defeat it. *Ash v. Bowen*, 10 Phila. 96. See § 827 *a*.

<sup>5</sup> *Hulme v. Tenant*, 1 Bro. Ch. 16; *Pybus v. Smith*, 3 Bro. Ch. 340; 1 Ves. Jr. 189.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*; *Ellis v. Atkinson*, 3 Bro. Ch. 565, 568; *Browne v. Like*, 14 Ves. 302; *Acton v. White*, 1 S. & S. 429; *Witts v. Dawkins*, 12 Ves. 501; *Wagstaff v. Smith*, 9 Ves. 250; *Sturgis v. Corp.*, 13 Ves. 190; *Scott v. Davis*, 4 M. & Cr. 87; *Hovey v. Blakeman*, 4 Ves. 524.

<sup>8</sup> *Ross's Trusts*, 1 Sim. (N. s.) 196.

<p>express words, exempt the husband from his common-law liability for her torts. <i>Quick v. Miller</i>, 103 Penn. St. 67.</p>	<p>She may be a trustee, and coverture is not a defence to a suit for a deposit made for safe-keeping. <i>Fullam v. Rose</i>, 106 Penn. St. 47.</p>
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liberty to sell or anticipate her interest, as such expressions are only the naming of some of the incidents of the gift.<sup>1</sup> There are generally some negative words, as "not by anticipation," inserted in settlements, and it has been said that they are necessary;<sup>2</sup> but it is sufficient if an intention to restrain anticipation can be gathered from the whole instrument,<sup>3</sup> as where the direction is to pay to such person as the wife shall appoint after it shall become due,<sup>4</sup> or for her sole, separate, and *inalienable* use,<sup>5</sup> or where the income is declared to be unassignable,<sup>6</sup> or where it is to remain in her possession, and be for her special use during her natural life, and at her death to go to her children, and no other use whatever.<sup>7</sup> It was at one time held, that "a trust to pay the proceeds to such persons as she should appoint when they became due, but not so as to anticipate the same, and, in default of appointment, into the hands of the wife for her separate use" (but without any other words to restrain her power of anticipation), was to be so construed that if the *feme covert* assigned the life-estate, limited to her in default of appointment, it destroyed the power of appointment, and the restraint upon anticipation annexed to it became nugatory; that is, the restraint against alienation applied *only to the power*, and not to an anticipation in some other way.<sup>8</sup> But these cases were reversed on appeal, or overruled; and now the construction is, that the payment into her hands, as well as the power to appoint, was not to operate until the income became due.<sup>9</sup>

<sup>1</sup> Parker v. White, 11 Ves. 222.

<sup>2</sup> Brown v. Bamford, 11 Sim. 131; 2 Rop. Hus. and Wife, 236, 240.

<sup>3</sup> Ross's Trusts, 1 Sim. (N. s.) 199; Doolan v. Blake, 3 Ir. Eq. 349.

<sup>4</sup> Field v. Evans, 15 Sim. 375; Baker v. Bradley, 7 De G., M. & G. 597.

<sup>5</sup> D'Echsnor v. Scott, 24 Beav. 239; Spring v. Pride, 10 Jur. (N. s.) 876.

<sup>6</sup> Rennie v. Ritchie, 12 Cl. & Fin. 204.

<sup>7</sup> Freeman v. Flood, 16 Ga. 528.

<sup>8</sup> Barrymore v. Ellis, 8 Sim. 1; Brown v. Bamford, 11 id. 127; Medley v. Horton, 14 id. 222.

<sup>9</sup> Moore v. Moore, 1 Coll. 84; Harrop v. Howard, 3 Hare, 624; Harnett v. McDougall, 8 Beav. 127; Brown v. Bamford, 1 Phil. 620; Gaffee's

§ 671. The restraint against alienation or anticipation will apply to both real and personal estate, and whether the estate is in fee or for life;<sup>1</sup> and when it has once attached, a court of equity cannot discharge it, even where alienation would be advantageous for the wife; as, where a large legacy was given to a married woman, on condition that she disposed of a small property, settled upon her without power of alienation, it was held that the condition could not be complied with, and the legacy therefore failed.<sup>2</sup> (a) But an estate so

Trust, 14 Jur. 277; 1 Mac. & G. 541; *Field v. Evans*, 15 Sim. 375; *Baker v. Bradley*, 7 De G., M. & G. 597; *Loring v. Salisbury Mills*, 125 Mass. 138; *Kent v. Plumb*, 57 Ga. 207.

<sup>1</sup> *Baggett v. Meux*, 1 Phil. 627; *Gaffee's Trust*, 14 Jur. 277; *Freeman v. Flood*, 16 Ga. 528.

<sup>2</sup> *Robinson v. Wheelwright*, 6 De G., M. & G. 535; 21 Beav. 214.

(a) A clause in a deed granting a title in fee, which restrains the grantee from conveying without the grantor's consent, is void, because repugnant to the interest created by the deed. *In re Rosher*, 26 Ch. D. 801; *Murray v. Green*, 64 Cal. 363; *Prey v. Stanley*, 110 Cal. 423; *Corse v. Chapman*, 153 N. Y. 466. In *Potter v. Couch*, 141 U. S. 296, 315, the court said, citing many authorities: "The right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. For the same reason, a limitation over, in case the first devisee shall alien, is equally void, whether the estate be legal or equitable. And on principle, and according to the weight of authority, a restriction, whether by way of condition or of devise over, not forbidding alienation to particular persons or for particular purposes only,

but against any and all alienation whatever during a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation." As to restraint on anticipation, see also *Stevens v. Trevor-Garrick*, [1893] 2 Ch. 307; *Re Milner's Settlement*, [1891] 3 Ch. 547; *Hamilton v. Hamilton*, [1892] 1 Ch. 396; *Loftus v. Heriot*, [1894] 2 Q. B. 212; *Re Holmes*, 67 L. T. 355; *Braunstein v. Lewis*, 64 L. T. 285; 65 id. 449; *Pelton v. Harrison*, [1891] 2 Q. B. 422; *Oxford v. Reid*, 22 Q. B. D. 548; *Michell v. Michell*, [1891] P. 208; *Hood-Barrs v. Heriot*, [1896] A. C. 174; *In re Lumley*, [1896] 2 Ch. 690; *Bateman v. Faber*, [1898] 1 Ch. 144; 48 Albany L. J. 123, 163.

A restraint on anticipation is equivalent to a restraint on alienation. *Re Currey*, *Gibson v. Way*, 32 Ch. D. 361; *Re Andrews*, *Edwards v. Dewar*, 30 Ch. D. 159; *Re Spen-*

settled is subject to paramount equities, as for raising costs of a suit which may enable the court to direct a sale.<sup>1</sup> A widow after her husband's death, and a single woman before marriage, may dispose absolutely of gifts to their separate use, although coupled with words restraining their power of anticipation;<sup>2</sup> upon the principle "that any person, *sui juris*,

<sup>1</sup> *Fleming v. Armstrong*, 34 Beav. 109, or in case of a divorce under the English statute. 22 & 23 Vict. c. 61, § 5; *Pratt v. Jenner*, 1 W. N. 265.

<sup>2</sup> *Jones v. Salter*, 2 R. & M. 208; *Woodmeston v. Walker*, id. 197; *Brown v. Pocock*, id. 210; 2 Myl. & K. 189; *Massey v. Parker*, id. 174; *Parker v. Converse*, 5 Gray, 336.

cer, *Thomas v. Spencer*, id. 183. A clause restraining anticipation may apply to gifts of capital or income. Ibid.; *Re Grey*, 34 Ch. D. 712. It has been held that a clause in restraint of alienation is ineffectual after a gift of money which is not producing income, and which there is no direction to invest. *In re Croughton's Trusts*, 8 Ch. D. 460. This rule, if sound (see Gray, *Restraints on Alienation*, § 131), is strictly limited to the case stated. *In re Ellis's Trusts*, 17 L. R. Eq. 409; *In re Benton*, 19 Ch. D. 277; *In re Clarke's Trusts*, 21 Ch. D. 748. Provisions against alienation of life interests are void, except in the case of married women. See Gray's *Restraints on Alienation* (2d ed.), §§ 140, 269; *Pritchard v. Bailey*, 113 N. C. 521; *Case v. Green*, 78 Mich. 540; *Brown v. McGill* (Md.), 39 Atl. 613. A gift to a married woman's separate use is not implied merely from the existence of a restraint on anticipation. *Baggett v. Meux*, 1 Coll. 138; 1 Phil. 627; *Stogden v. Lee*, [1891] 1 Q. B. 661; 64 L. T. 494. *In Re*

*Varnon's Trusts*, 31 Ch. D. 275, where a fund for an infant wife's separate use for life, with restraint on anticipation, was settled by a marriage settlement, which contained a covenant by her to settle future property, the wife was not required to elect between after-acquired property and her interest in the settled fund, but was held entitled to both.

In *Re Ridley*, 11 Ch. D. 645, Jessel, M. R., intimated that the rule against perpetuities should be held not to apply to restraints on alienation by married women, though the decision was the other way on authority. See also *Cooper v. Laroche*, 17 Ch. D. 368; *Herbert v. Webster*, 15 Ch. D. 610; *In re Michael's Trusts*, 46 L. J. Ch. 651.

The power given to the Court by the English Conveyancing and Property Act of 1881, § 39, to dispense with a restraint on anticipation, is a discretionary power, and is exercised only with caution. *Re Little, Harrison v. Harrison*, 40 Ch. D. 418; see *Hodges v. Hodges*, 20 Ch. D. 749.

possessing an interest, however remote, may dispose of such interest; and such person cannot be prevented, by any intention of the donor, from exercising the ordinary rights of ownership." Under whatever form of words alienation or anticipation may be restrained, a person who is *sui juris* may dispose of her interest. But if such right of alienation and anticipation is not exercised while the woman is single and *sui juris*, both the separate use and the provision against anticipation will come into operation upon marriage;<sup>1</sup> and it will be carried into effect, though the law of the domicile of the parties forbids such restraint;<sup>2</sup> but such restraints will not be allowed to stand where they fall within the rule against perpetuities.<sup>3</sup> The restraint upon anticipation will not prevent a husband from receiving his wife's separate income; nor will it render his estate liable for more than one year's income;<sup>4</sup> nor will it prevent his wife's engagements from being enforced against all arrears of income of her separate estate;<sup>5</sup> nor does it prevent her giving an order for future income, revocable at pleasure;<sup>6</sup> nor does it prevent her adjustment of the amount with the trustees;<sup>7</sup> but compensation for a breach of trust cannot be enforced against a fund limited by the same instrument to her separate use without power of anticipation;<sup>8</sup> nor can interest on bonds or notes, or dividends on stocks, accrued, but not yet payable, be anticipated, if anticipation is restrained.<sup>9</sup>

§ 672. There is another kind of trusts for married women, created by deeds of separation between husband and wife.

<sup>1</sup> Tullett v. Armstrong, 1 Beav. 1; 4 M. & Cr. 390, overruling Davies v. Thornycroft, 6 Sim. 420; Brown v. Pocock, 5 Sim. 663; Johnson v. Freeth, 6 Sim. 423; Wells v. McCall, 64 Penn. St. 207.

<sup>2</sup> Peillon v. Brooking, 25 Beav. 218.

<sup>3</sup> Fry v. Capper, Kay, 163.      <sup>4</sup> Rowley v. Unwin, 2 K. & J. 138.

<sup>5</sup> Fitzgibbon v. Blake, 3 Ir. Eq. 328.      <sup>6</sup> Moore v. Moore, 1 Coll. 57.

<sup>7</sup> Wilton v. Hill, 2 L. J. Ch. 156; Derbishire v. Home, 5 De G., M. & G. 113; Stroud v. Grozer, Lewin on Trusts, 556 (5th ed.).

<sup>8</sup> Clive v. Carew, 1 John. & Hem. 199; Sheriff v. Butler, 12 Jur. (N. S.) 329; Davies v. Dodgson, 25 Beav. 186.

<sup>9</sup> Re Brettell, 2 De G., J. & Sm. 79; Jollands v. Burdett, id.; 10 Jur. (N. S.) 349.

Such deeds are valid in law, so far that the covenants contained in them may form a good consideration for a promise to pay certain debts and expenses.<sup>1</sup> Courts of equity will not specifically enforce agreements of husband and wife to live separate and apart; for that is contrary to the policy of the law.<sup>2</sup> Yet where such agreements have been entered into and executed, courts will enforce the specific performance of the provisions in favor of the wife, and will compel the trustees under such deeds to perform their duty.<sup>3</sup> The jurisdiction of the court is generally confined to agreements

<sup>1</sup> *Jones v. Waite*, 5 Bing. N. C. 341, affirmed in 9 Cl. & F. 101; 4 M. & G. 1104; *Calkins v. Long*, 22 Barb. 97.

<sup>2</sup> *Head v. Head*, 3 Atk. 550; *Wilkes v. Wilkes*, 2 Dick. 791; *Warrall v. Warrall*, 3 Mer. 268.

<sup>3</sup> *Guth v. Guth*, 3 Bro. Ch. 614; *St. John v. St. John*, 11 Ves. 526; *Worrall v. Jacob*, 3 Mer. 256; *Westmeath v. Westmeath*, Jac. 126; *Westmeath v. Salisbury*, 5 Bligh, 375; *Hoare v. Hoare*, 2 Ridg. P. C. 268; *Wilson v. Wilson*, 14 Sim. 405; 1 H. L. Cas. 538; *Elworthy v. Bird*, 2 S. & S. 372; *Frampton v. Frampton*, 4 Beav. 287; *Jones v. Waite*, 5 Bing. N. C. 341; 9 Cl. & F. 10; 4 M. & G. 1104; *Cooke v. Wiggins*, 10 Ves. 191; *Seeling v. Crawley*, 2 Vern. 386; *Angier v. Angier*, Gilb. Eq. 142; *Pr. Ch. 496*; *Fletcher v. Fletcher*, 2 Cox, 109; *Hyde v. Price*, 3 Ves. Jr. 437; *Rodney v. Chambers*, 2 East, 283; 6 East, 252; 2 B. & C. 551; *Durant v. Titley*, 7 Price, 577; *Stephens v. Olive*, 2 Bro. Ch. 90; *Hobbs v. Hull*, 1 Cox, 445; *More v. Freeman*, Bunb. 205; *Bateman v. Ross*, 1 Dow, 235; *Ross v. Willoughby*, 10 Price, 2; *Logan v. Birkett*, 1 M. & K. 220; *Clough v. Lambert*, 10 Sim. 256; 4 M. & K. 561; *Wellesley v. Wellesley*, 4 M. & C. 561; *Wilson v. Mushet*, 3 B. & Ad. 743. Lord Chancellor Cottenham said that all the older cases might be thrown aside, and that the later cases, especially those in the House of Lords, settled the law. *Wilson v. Wilson*, 1 H. L. Cas. 572. In the United States the same general rule is held. *Champlin v. Champlin*, 1 Hoff. Ch. 55; *Rogers v. Rogers*, 4 Paige, 518; *Carson v. Murray*, 3 id. 483; *Mercein v. People*, 25 Wend. 77; *McKenna v. Phillips*, 6 Whart. 571; *Hutton v. Duey*, 3 Penn. St. 100; *Dellinger's App.*, 35 id. 357; *Simpson v. Simpson*, 4 Dana, 140; *McCrocklin v. McCrocklin*, 2 B. Mon. 370; *Mansfield v. Mansfield*, *Wright (Ohio)*, 284; *Reed v. Beazley*, 1 Blackf. 97; *Sterling v. Sterling*, 12 Ga. 201; *Coster v. Coster*, 14 Sm. & M. 59; *Picket v. Johns*, 1 Dev. Eq. 123; *Page v. Trufant*, 2 Mass. 158; *Hollenbeck v. Pexley*, 3 Gray, 521; *Albee v. Wyman*, 10 Gray, 222; *Holbrook v. Comstock*, 16 Gray, 101; *Walker v. Walker*, 9 Wall. 744; *Baker v. Barney*, 8 Johns. 72; *Beach v. Beach*, 2 Hill, 260; *Shelthar v. Gregory*, 2 Wend. 422; *Calkins v. Long*, 22 Barb. 97; *Wells v. Stout*, 9 Cal. 494.

concerning property, though it may enjoin the parties from litigation in courts, if they have covenanted not to prosecute a suit for divorce, separation, or restitution of conjugal rights.<sup>1</sup> So if the husband has covenanted not to visit or annoy his wife, he can be enjoined from breaking the covenant.<sup>2</sup> The court may compel the execution of a deed where an agreement has been entered into for a good consideration and acted upon, or it may correct a mistake in such deed.<sup>3</sup> But no agreements for a future separation will be considered by the court.<sup>4</sup> Nor can the payment of an annuity be enforced if granted on condition that a separation should take place in the future.<sup>5</sup> An agreement, however, by a husband, that he will pay back all the advances made to his wife by her father, in case they separate, is valid, and may be enforced if made by deed.<sup>6</sup> Mere deeds of separation are no bar to a divorce, if there is good cause;<sup>7</sup> but if parties live apart by agreement and consent, a divorce cannot be obtained on the ground of desertion. \* Nor are they any bar to a claim for alimony upon a divorce granted, but the rights secured by such deeds will of course be taken into consideration as to the amount of alimony.<sup>8</sup> And a proceeding in the courts for a divorce and for alimony may be an abandonment of the covenants in a deed of separation.<sup>9</sup>

§ 673. It may be said generally, that in order to make a valid deed of separation which will save the rights of all par-

<sup>1</sup> *Wilson v. Wilson*, 1 H. L. Cas. 571.

<sup>2</sup> *Sanders v. Rodway*, 16 Beav. 207; *Green v. Green*, 5 Hare, 400, n.; *Webster v. Webster*, 4 De G., M. & G. 437.

<sup>3</sup> *Wilson v. Wilson*, 5 H. L. Cas. 40.

<sup>4</sup> *Durant v. Titley*, 7 Price, 577; *Hobbs v. Hall*, 1 Cox, 445; *Westmeath v. Westmeath*, Jac. 142, controlling *Rodney v. Chambers*, 2 East, 297; *Hoare v. Hoare*, 2 Ridg. P. C. 268; *Chambers v. Caulfield*, 6 East, 244; *Hutton v. Duey*, 3 Penn. St. 106; *Dellinger's App.*, 35 id. 357; *Hitter's App.*, 54 id. 114.

<sup>5</sup> *Cocksedge v. Cocksedge*, 5 Hare, 397; 8 Jur. 659.

<sup>6</sup> *Waring v. Waring*, 10 B. Mon. 331.

<sup>7</sup> *Anderson v. Anderson*, 1 Edw. Ch. 380.

<sup>8</sup> *Miller v. Miller*, Saxt. 386.

<sup>9</sup> *Albee v. Wyman*, 10 Gray, 222.

ties, there must be trustees interposed to take the property for the use of the wife, and to enter into covenants in her behalf.<sup>1</sup> If trustees are interposed, and they covenant, in consideration of the provisions for the wife, to indemnify the husband against her debts, or other claims on his property, it will form a valuable consideration, which will support the transaction against the husband's creditors.<sup>2</sup> The absence of such covenants on the part of the trustees will not invalidate the deed as against the husband;<sup>3</sup> but it would not be good, for want of a consideration, against his creditors.<sup>4</sup> If, however, the provisions for the wife still stand only in agreement, and there are no covenants by trustees or other valuable considerations to support the agreement, it would be a *nudum pactum*, which equity cannot enforce.<sup>5</sup> If there is a suit for divorce, or for nullity of the marriage, and the husband enter into agreements, in consideration of the discontinuance of such suit, the discontinuance of the suit is a sufficient consideration for the agreements.<sup>6</sup> If the trust is actually created and acted upon, it is not necessary that the instrument should be formally executed as a deed.<sup>7</sup> So if an agreement for an immediate separation is entered into by husband and wife, and acted upon without the intervention of trustees, equity will sustain the agree-

<sup>1</sup> *St. John v. St. John*, 11 Ves. 526; *Legard v. Johnson*, 3 Ves. Jr. 359; *Worrall v. Jacob*, 3 Mer. 268; *Carson v. Murray*, 3 Paige, 433; *Simpson v. Simpson*, 4 Dana, 140; *Bettle v. Wilson*, 14 Ohio, 257; *Tourney v. Sinclair*, 3 How. (Miss.) 324; *Carter v. Carter*, 14 S. & M. 59; *Watkins v. Watkins*, 7 Yerg. 283. But see *Dutton v. Dutton*, 30 Ind. 452.

<sup>2</sup> *Stephens v. Olive*, 2 Bro. Ch. 90; *Compton v. Collinson*, id. 38; *Worrall v. Jacob*, 3 Mer. 256; *Elworthy v. Bird*, 2 S. & S. 381.

<sup>3</sup> *Fitzer v. Fitzer*, 2 Atk. 511; *Westmeath v. Westmeath*, Jacob, 126; *Frampton v. Frampton*, 4 Beav. 287; *Reed v. Beazley*, 1 Blackf. 98; *Bowers v. Clark*, Phila. 561.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Elworthy v. Bird*, 2 S. & S. 371; *Wilson v. Wilson*, 14 Sim. 405; 1 H. L. Cas. 538.

<sup>6</sup> *Elworthy v. Bird*, 2 S. & S. 371; *Wilson v. Wilson*, 14 Sim. 405; 1 H. L. Cas. 538.

<sup>7</sup> *Ibid.*; *Angier v. Angier*, Pr. Ch. 496; *Head v. Head*, 3 Atk. 54.



ment, and will carry it into effect by treating the husband as a trustee, and by compelling him to complete and carry the trust into effect.<sup>1</sup>

§ 674. Where property is vested by the husband in trustees for the separate use of the wife, under a deed of separation, the wife cannot exercise the same power in regard to it that she can over her ordinary separate estate, but she will take it under all the common-law disabilities of coverture; consequently, she cannot sell or charge it with her debts or contracts.<sup>2</sup> But, of course, her power over the property will depend very much upon the terms of the deed of separation; for the husband may give her the absolute equitable interest in the property, or he may confine her to the reception of the income from year to year, and so he may clothe her with the power of disposing of the property after her death by a will or appointment, or he may limit the property to himself or his heirs after her decease. Thus where a husband put property into the hands of a trustee, for the use of the wife on a separation, and they were afterwards reconciled and lived together, it was held that the property was settled to the separate use of the wife, notwithstanding they lived together.<sup>3</sup> So where the settlement is once made, friendly visits between husband and wife, and expressions of regret at the separation, not accompanied with cohabitation, will not discharge or annul the settlement.<sup>4</sup> It is the duty of the trustees to carry out all the provisions of the trust for the wife, so long as it subsists; and if there are covenants of the husband or other persons for the benefit of the wife, the trustees must sue for the breach of them, and apply the proceeds to the purposes of the trust. If the trustees neglect or decline to do this, the wife may bring a suit in equity, by her

<sup>1</sup> *More v. Ellis*, Bunb. 205; *Guth v. Guth*, 3 Bro. Ch. 614; *Frampton v. Frampton*, 4 Beav. 294; *Hutton v. Duey*, 3 Penn. St. 100; *Barron v. Barron*, 24 Vt. 375; *Picket v. Johns*, 1 Dev. Eq. 123.

<sup>2</sup> *Hyde v. Price*, 3 Ves. Jr. 437.

<sup>3</sup> *Huntly v. Huntly*, 6 Ired. Eq. 514; *Ratcliffe v. Huntly*, 5 Ired. 545.

<sup>4</sup> *Heyer v. Burger*, 1 Hoff. Ch. 1; *Webster v. Webster*, 1 Sm. & Gif.

next friend, against both the trustees and the husband, or other persons liable under the settlement.<sup>1</sup> And the husband may also interfere, and maintain a bill for the proper execution of the trusts which he has created for the benefit of his wife.<sup>2</sup>

§ 675. The statutes of many of the United States have very materially affected the rights of married women in regard to their separate property; or rather these statutes have converted nearly all the property that married women may at any time have, into estates settled to their separate use, without the intervention of a trustee. The substance of all these statutes is, that all the property, both real and personal, which a married woman owns, or which comes to her by devise, bequest, gift, or grant; and that which she acquires by her trade, business, labor, or services, carried on or performed on her separate account; and that which she owned at the time of her marriage, and the issues, income, profits, and proceeds of such property, — shall be and remain her sole and separate property, and may be used, collected, and invested in her own name, and shall not be subject to the interference or control of her husband or liable for his debts; and she may bargain, sell, and convey her separate real and personal property, enter into any contracts in reference to the same, carry on any trade or business, and perform any labor or services on her sole and separate account, and sue and be sued in all matters having relation to her separate property, business, trade, services, labor, and earnings in the same manner as if she were *sole*. There is generally a provision attached to these statutes, that she shall not convey her real estate except her husband joins in the deed, or assents to the conveyance in writing, and the same provision exists in some States in relation to some kinds of personal property, as stocks or shares in corporations. It is also generally provided, that trustees may be appointed to hold the title of such property for the separate

<sup>1</sup> *Cooke v. Wiggins*, 10 Ves. 191; *Seagrave v. Seagrave*, 13 Ves. 439.

<sup>2</sup> *Cranston v. Plumb*, 54 Barb. 59.

use of the married woman, if she desires it.<sup>1</sup> As the husband takes no present beneficial interest in his wife's property, at the time he assumes the obligations of marriage, the statutes of some States have released him from some of the burdens of marriage by providing that he shall not be liable for any of his wife's antenuptial debts or contracts;<sup>2</sup> and perhaps the statutes, in order to make a perfect system, should go further, and provide that he should not be liable for any torts of his wife, as for slander, libel, and the like.<sup>3</sup>

§ 676. These statutes have not yet been moulded into a consistent whole, nor have they received such judicial construction that any certain general principles can be safely affirmed of them all; but it would appear that they cannot affect any rights of the husband in his wife's property which became vested before the passage of them, it being contrary to the general principles of law, as well as of the constitution of the United States, and of the several States, to destroy vested interests, or to transfer them from one person to another. Thus a husband, married in any one of the States before the passage of the statute in that State, took the prop-

<sup>1</sup> This is the substance of the Massachusetts statute, Gen Stat. c. 108, §§ 1, 3, 4. It is impossible to cite all the statutes of so many different States. Some go further than the statute of Massachusetts, and some do not go so far. The general principles of the statutes in all the States are essentially the same, but there is great variety in the details.

<sup>2</sup> In *Dickson v. Miller*, 11 Sm. & M. 594, it is said that "in marriage, although a husband runs the hazard of being liable for his wife in an amount greater than the value of the estate he receives by her, he also has the chance of receiving by her an amount far exceeding her debts; but where the whole estate of the wife, notwithstanding coverture, continues separate to her, there is no such recompense to the husband for his obligations for his wife's debts, but, on the contrary, there may be a certainty of his becoming indebted, on behalf of his wife, with no possibility of his receiving an amount even equal to her debts." See *Cater v. Everleigh*, 4 Des. 19. Where statutes have abolished his liability for her debts this criticism is avoided. *Bailey v. Pearson*, 9 Fost. 77; *Reunnecker v. Scott*, 4 Green (Iowa), 185; *Callahan v. Patterson*, 4 Tex. 61; *Curry v. Shrader*, 19 Ala. 831.

<sup>3</sup> *Brown v. Kemper*, 27 Md. 666.

erty that his wife then had according to the statute or law in force at the time of the marriage.<sup>1</sup> Therefore if a husband took his wife's money at the time of his marriage, under existing laws, and a statute was afterwards passed conferring upon the wife the right to hold her separate property, and the husband purchased land with the money, and took the deed in his wife's name, the land will nevertheless belong to him, as purchased with his money.<sup>2</sup> But statutes may declare what rights a husband shall take in property that comes to his wife after the passage of the act, and after the marriage.<sup>3</sup> On principle, it would seem that the right to reduce a wife's *choses in action* to possession vested in the husband at the time of the marriage, and could not be divested by a statute passed after the marriage, although the husband had not, at the time of the passage of the act, reduced the *choses* to possession; and so it has been ruled in several cases.<sup>4</sup> No prior debts of the husband can alter the rights of the parties, and affect the interests of a married woman in property coming to her after the enactment of the statute.<sup>5</sup>

<sup>1</sup> Eldredge v. Preble, 34 Maine, 148; Peck v. Walton, 26 Vt. 82; Jenney v. Gray, 5 Ohio St. 45; Snyder v. Snyder, 3 Barb. 621; Perkins v. Cottrell, 15 Barb. 446; Burson's App., 22 Penn. St. 164; Roby v. Boswell, 23 Ga. 51; Tyrson v. Mattair, 8 Fla. 107; Maynard v. Williams, 17 Ala. 676; Ratcliffe v. Dougherty, 24 Miss. 181; Tally v. Thompson, 20 Miss. 277; Carter v. Carter, 14 Sm. & M. 59; Love v. Robertson, 7 Tex. 6; Ryder v. Hulse, 33 Barb. 264; 24 N. Y. 372; Savage v. O'Neil, 42 Barb. 374; Macclay v. Love, 25 Cal. 367; Quigley v. Graham, 18 Ohio St. 42.

<sup>2</sup> Sharp v. Maxwell, 30 Miss. 442. But it is a question of fact and intention whether the husband reduced the money to possession before paying it over for the deed, so that the equitable as well as the legal title would vest in him. Moulton v. Haley, 57 N. H. 184.

<sup>3</sup> Sleight v. Read, 18 Barb. 159; Southard v. Plummer, 36 Maine, 64.

<sup>4</sup> Ryder v. Hulse, 24 N. Y. 372; Westvelt v. Gregg, 2 Kern. 202; Stearns v. Mathews, 30 Ala. 712; Noble v. McFarland, 51 Ill. 226; Coombs v. Read, 16 Gray, 271. The opposite rule has been held in Pennsylvania and New Jersey. Henry v. Dilley, 1 Dutch. 302; Millinger v. Bausman, 45 Penn. St. 522; Goodyear v. Rumbaugh, 13 id. 480.

<sup>5</sup> Sleight v. Read, 18 Barb. 159. But see Cunningham v. Gray, 20 Mo. 170.

§ 677. The passage of these acts does not affect settlements, already made at the time of their passage, to the separate use of married women.<sup>1</sup> So they do not affect the right of a woman to a settlement of her estate upon herself, if she chooses to invoke the old equity of a settlement of her *choses in action*, it being held that these statutes are an enlargement and not a diminution of her rights.<sup>2</sup> The statutes of some of the States provide that she may have a trustee to take her separate property, if she prefers that mode of holding it. The jurisdiction of courts of equity over the property and proprietary rights of married women is not taken away by these acts, but the equity powers of the courts may still be invoked, where it is necessary to secure their separate property to their use, according to the intention of the statutes, or the intention of the donors of such property.<sup>3</sup> It may be stated, as a general rule, that the same principles of construction and of practice apply to these statutes as were applied to the old settlements of a wife's separate property upon herself. Thus the presumption still is, as it was at common law, that a married woman's property belongs to her husband; and it is necessary to rebut that presumption by showing that it came to the wife, under such circumstances, and at such times, and by such gifts, grants, or bequests, that it belongs to the wife, and not to him, and that it is not liable for his debts.<sup>4</sup> This is nothing more than the principle that runs through the whole body of jurisprudence. Statutes in derogation of the common law are strictly construed; and if a particular matter is to be taken out of the operation of the common law, it must be shown to be within

<sup>1</sup> Willis v. Cadenhead, 28 Ala. 472; Hardy v. Boaz, 29 Ala. 168.

<sup>2</sup> Blevins v. Buck, 26 Ala. 292.

<sup>3</sup> Calvin v. Currier, 22 Barb. 371; Mitchell v. Otey, 23 Miss. 236; Richardson v. Stodder, 100 Mass. 528; Lampley v. Watson, 43 Ala. 377.

<sup>4</sup> Eldredge v. Preble, 34 Maine, 148; Gault v. Saffin, 44 Penn. St. 307; Bear v. Bear, 33 id. 525; Winter v. Walters, 37 id. 157; Gamber v. Gamber, 18 id. 363; Goodyear v. Rumbaugh, 13 id. 480; Alverson v. Jones, 10 Cal. 9; Stanton v. Kirsch, 6 Wis. 338; Smith v. Hewett, 13 Iowa, 94; Smith v. Henry, 35 Miss. 369. Contrary opinions were expressed in Johnson v. Runyan, 21 Ind. 115; Stewart v. Ball, 3 Mo. 154.

the letter or spirit of the statute so changing the common law.

§ 678. The husband may constitute his wife his agent to transact his business and to deal with his property. In the same manner the wife may appoint her husband her agent to manage her separate property. And, as at common law, the mere fact that a husband did not reduce his wife's *choses in action* to possession immediately, but allowed her to use and enjoy them, and even to take notes in her own name, could not be used as conclusive proof that he abandoned his right, and gave the *choses* to her;<sup>1</sup> so the mere fact, that a husband is in possession of his wife's property under these statutes, will not destroy her right to the same, if it appears that he acts as her agent. (a) So long as property may be identified

<sup>1</sup> *Ryder v. Hulse*, 33 Barb. 264; 24 N. Y. 372.

(a) Marriage does not sever the wife's joint tenancy in a *chose in action* not reduced into possession by her husband. *In re Butler's Trusts*, 38 Ch. D. 286, disapproving *Baillie v. Treharne*, 17 Ch. D. 388.

Power given by statute to the wife to trade as a *feme sole* does not affect her relations to her husband, or enable the relation of debtor and creditor to be established between them. *Leahy v. Leahy* (Ky.), 29 S. W. Rep. 852; *Snashall v. Met. R. Co.*, 19 D. C. 399. Where the wife can engage in business as a *feme sole*, the husband can be her agent in the business, and she can make him her attorney in fact. *Kirkey v. Lacy*, 7 Houst. (Del.) 213; *Richmond v. Voorhees* (Wash.), 38 Pac. Rep. 1014. As the husband is entitled to the wife's earnings at common law, the burden is upon her to show that property purchased by her during coverture was bought

with her own and not her husband's funds. *Walker v. Peck*, 39 W. Va. 325; *Crook v. Tull* (Mo.), 20 S. W. Rep. 8; *Bynum v. Frederick*, 81 Ala. 489; *Yesler v. Hochstettler*, 4 Wash. St. 349. Earnings from a business which the husband permits his wife to conduct on her own account are her separate property. *Baer v. Pfaff*, 44 Mo. App. 35. The husband's power to bind his wife's separate estate terminates with her death. *Gibbs v. Bunch*, 63 Miss. 47. The New Hampshire statute allowing a wife to hold her own property free from her husband's control does not apply to property received by her before its enactment. *Allen v. Coburn*, 65 N. H. 37, 38.

A married woman, who can by local law become a shareholder in a national bank or other corporation, is liable for assessments on her shares. *In re First National Bank*,

as belonging to her, or so long as its income or proceeds can be clearly traced and identified as coming from her property, although managed by her husband as her agent, she is entitled to recover the same.<sup>1</sup> The wife may give a power of attorney to her husband to execute a deed of her land in her name;<sup>2</sup> a husband can conduct a suit in the name of the wife for damages to her property;<sup>3</sup> and the husband may employ other agents and attorneys in her name in relation to her separate property under the statute.<sup>4</sup> So the fact, that the husband manages her property, or that she allows him a living from the income, gives his creditors no claim to other parts of her separate estate.<sup>5</sup> So if he lives with her on her land, and cultivates and improves it, and makes betterments, without any agreement with her, it will give neither him nor his creditors any interest in the land, buildings, betterments, crops or improvements; but the owner of the land, in the absence of all agreements, will own all these incidents to the land itself.<sup>6</sup> But, as under the law in relation to settlements for the separate use of a married woman, if she allowed her husband to receive her property, and to deal with it as his own in business, or in paying his debts,

<sup>1</sup> *Jenning v. Davis*, 31 Conn. 134; *Hutchins v. Colby*, 43 N. H. 139; *Teller v. Bishop*, 8 Minn. 226; *Kirkpatrick v. Beauford*, 21 Ark. 268; *Buckley v. Wells*, 33 N. Y. 518; *Knapp v. Smith*, 27 N. Y. 277.

<sup>2</sup> *Weisbrod v. Chicago, &c. R. R. Co.*, 18 Wis. 35; *Peck v. Hendershott*, 14 Iowa, 40.

<sup>3</sup> *Woodman v. Neal*, 48 Maine, 266.

<sup>4</sup> *Southard v. Plummer*, 36 Maine, 64.

<sup>5</sup> *Buckley v. Wells*, 33 N. Y. 518; *Knapp v. Smith*, 27 N. Y. 277.

<sup>6</sup> *Betts v. Betts*, 18 Ala. 787; *McIntire v. Knowlton*, 6 Allen, 565; *Allen v. Hightower*, 21 Ark. 316; *Welston v. Hildreth*, 39 Vt. 457; *Lewis v. Johns*, 24 Cal. 98; *Chauvete v. Mason*, 4 Green (Iowa), 231; *White v. Hildreth*, 32 Vt. 465; *Colman v. Satterfield*, 2 Head, 259; *Goss v. Cahill*, 42 Barb. 216; *Robinson v. Huffman*, 15 B. Mon. 80; *Jenney v. Gray*, 5 Ohio St. 45; *Wilkinson v. Wilkinson*, 1 Head, 305; *Johnson v. Vail*, 1 McCart. 423; *Hodges v. Cobb*, 8 Rich. 50; *Abby v. Dego*, 44 N. Y. 343. A wife may lease her land to her husband. *Atkin v. Lord*, 39 N. H. 196.

or in supporting the family, she would be presumed to assent to such use; so if a married woman, owning property under these statutes, allows her husband to receive her separate property, and to use it in business or mix it with his own in such manner that her property cannot be identified or separated from the general mass, she will lose her rights in such property as against her husband's creditors,<sup>1</sup> and she will have no remedy except in equity as a creditor.<sup>2</sup> If a husband, acting as the agent of his wife, signs a note in her name, he will not be held upon the note, although his wife may be insolvent; that is, the same principles apply when husband and wife are principal and agent, as apply to other principals and agents.<sup>3</sup>

§ 679. When a married woman holds property to her separate use under a settlement, or under these statutes, she may give it to her husband, or sell it to him for a valuable consideration;<sup>4</sup> and if she allows him to receive her property, or the income of it, her assent will be presumed. If she gives it to him, she can make no claim upon him or his estate for reimbursement;<sup>5</sup> but if the circumstances do not sustain the presumption of a gift, she will be entitled to compensation from his estate. So the terms upon which a husband is dealing with his wife's property may always be proved, and must generally be determined by the evidence. If it appears that the husband acted as the agent of the wife, there is no presumption of a gift.<sup>6</sup> As all transfers from the wife to the husband are somewhat suspicious by reason of the relation, and the danger of some secret influence, gifts of the capital

<sup>1</sup> *Glover v. Alcott*, 11 Mich. 470; *Kelly v. Drew*, 12 Allen, 107; *Gross v. Reddig*, 45 Penn. St. 406; *Gardner v. Gardner*, 1 Gif. 126.

<sup>2</sup> *Glidden v. Taylor*, 16 Ohio St. 509.

<sup>3</sup> *Taylor v. Shelton*, 30 Conn. 122.

<sup>4</sup> *Lyn v. Ashton*, 1 Russ. & M. 190; *Dallam v. Wampole*, 1 Pet. C. C. 116; 2 Kent, 111; *Hinney v. Phillips*, 50 Penn. St. 382; *Johnston v. Johnston*, 1 Grant, 468; *White v. Callinan*, 19 Ind. 43; *Gage v. Dauchy*, 28 Barb. 622; *Roper v. Roper*, 29 Ala. 247; *Fox v. Jones*, 1 W. Va. 205.

<sup>5</sup> *Paulet v. Delavel*, 2 Ves. 663; *Edelen v. Edelen*, 11 Md. 415.

<sup>6</sup> *Elijah v. Taylor*, 37 Ill. 247; *Wales v. Newbould*, 9 Mich. 45.



sum are not presumed in the first instance; but there is less suspicion attached to transfers of the income to him than to transfers of the capital sum, for the reason that the income is generally appropriated to, and consumed in, the support of the husband and wife and their family.

§ 680. The rules in relation to the general contracts of married women, and their binding effect upon their separate estates under the old form of settlements, apply substantially in the same manner to their separate estates under these statutes. It will be remembered that the contracts themselves were utterly void, but that equity gave them effect as *quasi* charges upon their separate property.<sup>1</sup> These statutes have legalized contracts of married women. But all contracts made by them are not legalized. They are empowered to make "contracts, and to sue and be sued, only in relation to their separate estates;" and in some States, also, to make contracts and incur liabilities for supplies to the family. It was seen that, under the old settlements in England, and in a few of the States, the general engagements of married women were enforced in equity against their separate estates although those engagements had no reference to their separate estates, and were not for the benefit of the estates or of themselves personally.<sup>2</sup> In a majority of the United States a more limited rule was applied, and the contracts of married women were not enforced against their separate estates, unless these contracts were made in relation to their estates, and were for the benefit of their estates, or for their own personal benefit.<sup>3</sup> The same principles are applied in enforcing the contracts of married women under the statutes. A married woman may give her note for her husband's or other person's debt, and make such note a legal charge upon her separate estate by duly executing a mortgage according to law.<sup>4</sup> In such case she will be deemed a mere surety for

<sup>1</sup> *Ante*, §§ 657-663.

<sup>2</sup> *Ante*, § 660.

<sup>3</sup> *Ante*, § 661.

<sup>4</sup> *Eaton v. Wason*, 47 Maine, 132; *Bartlett v. Bartlett*, 4 Allen, 440;

her husband, and will be entitled to compensation out of her husband's estate, if she pays the debt.<sup>1</sup> But if a married woman executes a note for the debt of her husband, or for the debt of any other person, and such note or contract is not, by mortgage or other deed, made a charge or lien upon her separate estate, and is not for her personal benefit, nor for the benefit of her estate, nor in relation to it, it cannot be enforced against her; that is, it is not within the terms of the statute authorizing her to contract.<sup>2</sup> On this principle, all contracts and notes entered into by a wife in relation to her separate property, as for improvements made upon her separate land, or for materials to be used upon it in building a house, or for labor in cultivating it, may be enforced against her by a direct suit at law; and an execution may issue against her, and be levied upon her separate property.<sup>3</sup>

*Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Van Horne v. Everson*, 13 Barb. 526; *Vartie v. Underwood*, 18 Barb. 561; *Leavitt v. Peel*, 25 N. Y. 474; *Younge v. Graff*, 28 Ill. 20; *Ellis v. Kenyon*, 25 Ind. 134; *Watson v. Thurber*, 11 Mich. 457; *Wolff v. Van Meter*, 19 Iowa, 134; *Green v. Scrannage*, id. 461; *Spear v. Ward*, 20 Cal. 659; *Gardner v. Gardner*, 7 Paige, 112; *Keller v. Ruiz*, 21 La. An. 283; *Kinner v. Walsh*, 44 Mo. 65; *McFerrin v. White*, 6 Cold. 499. But see *Bibb v. Pope*, 43 Ala. 190; *Van Kirk v. Skillman*, 34 N. J. 109.

<sup>1</sup> *State v. Hulick*, 33 N. J. L. 307; *Harford v. Baker*, 20 N. J. Eq. 101; *Kinner v. Walsh*, 44 Mo. 65.

<sup>2</sup> *Yale v. Dederer*, 18 N. Y. 265; 22 N. Y. 450; *White v. McNett*, 33 N. Y. 371; *Ledlie v. Vrooman*, 41 Barb. 109; *White v. Story*, 43 Barb. 124; *Parker v. Simonds*, 1 Allen, 258; *Crane v. Kelley*, 7 id. 250; *Shannon v. Canney*, 44 N. H. 592; *Bailey v. Pearson*, 9 Fost. 77; *Noyes v. Blakeman*, 3 Sand. 531; 2 Seld. 567; *Manchester v. Sahler*, 47 Barb. 155; *Hutchman v. Underwood*, 27 Tex. 255; *Keaton v. Scott*, 25 Ga. 652; *Sweeney v. Smith*, 15 B. Mon. 325; *Wolff v. Van Meter*, 19 Iowa, 134; *Brunner's App.*, 47 Penn. St. 67; *Patton v. Stewart*, 19 Ind. 233; *Cummings v. Miller*, 3 Grant, 143; *Steinman v. Ewing*, 43 Penn. St. 63; *Ramborger v. Ingram*, 3 id. 146; *Rumfelt v. Clemens*, 46 id. 455; *Lytle's App.*, 36 id. 131; *Parke v. Kleeber*, 37 id. 251; *Peake v. Le Bow*, 21 N. J. Eq. 269; *Kimm v. Weippert*, 46 Mo. 532; *Schafroth v. Ambs*, 46 Mo. 114; *Nunn v. Graham*, 45 Ala. 370.

<sup>3</sup> *Rogers v. Ward*, 8 Allen, 387; *Davenport v. Davenport*, 5 id. 464; *Parker v. Kane*, 4 id. 346; *Heugh v. Jones*, 32 Penn. St. 432; *Major v. Symmes*, 19 Ind. 117; *Conway v. Smith*, 13 Wis. 125; *Marshall v. Miller*, 3 Met. (Ky.) 333; *Butler v. Robertson*, 11 Tex. 142; *Carpenter v. Leon-*

But in an action of law against a married woman living with her husband, the burden is upon the plaintiff to show such facts as will make her liable upon a contract.<sup>1</sup> She may make parol as well as written contracts binding upon her separate estate, but it must appear that she intended to contract in relation to her separate estate;<sup>2</sup> but it is said that it is not so much a question of her intention as to her separate estate, as it is whether she intended to contract a debt of her own.<sup>3</sup>

§ 681. Although a husband has a right to curtesy or a life-estate in his wife's real estate if he survives her, yet he cannot convey that estate or interest during her life, without her consent, so as to give possession to the purchaser; nor can his creditors seize it on execution;<sup>4</sup> nor can the husband in any way incumber the estate, as by a mechanic's lien for building a house upon it;<sup>5</sup> nor by mortgage,<sup>6</sup> — without the agreement, consent, or concurrence of the wife.

§ 682. The statutes of the several States have various provisions enabling a married woman to make a will of her separate property. In some States, the will must be assented

ard, 5 Minn. 155; *McCormick v. Holbrook*, 22 Iowa, 487; *Tucker v. Guest*, 46 Mo. 339; *Lyon v. Swayne*, 7 Phila. 154; *Ainsley v. Mead*, 3 Lansing, 116; *Lindley v. Cross*, 31 Ind. 106; *Marsh v. Alford*, 5 Bush, 392; *Westgate v. Monroe*, 100 Mass. 227. In Missouri, proceedings to charge a married woman's separate estate can only be taken in a court of chancery. *Schafroth v. Ambs*, 46 Mo. 114. So in Alabama, *Pollard v. Cleveland*, 43 Ala. 102; and in New Jersey, *Harford v. Baker*, 20 N. J. Eq. 101.

<sup>1</sup> *Tracy v. Keith*, 11 Allen, 214; *Kimm v. Weippert*, 46 Mo. 532; *Dunbar v. Meyer*, 43 Miss. 679; *Harris v. Dole*, 5 Bush, 61; *Demott v. Muller*, 8 Abb. (N. Y.) 335.

<sup>2</sup> *Miller v. Brown*, 47 Mo. 504; *Morse v. Mason*, 103 Mass. 560; *Guion v. Doherty*, 43 Miss. 538.

<sup>3</sup> *Miller v. Brown*, 47 Mo. 504; *Kantrowitz v. Prater*, 31 Ind. 92; *Smith v. Howe*, id. 233; *Corning v. Lewis*, 54 Barb. 51.

<sup>4</sup> *Jenney v. Gray*, 5 Ohio St. 45; *Coleman v. Satterfield*, 2 Head, 259.

<sup>5</sup> *Briggs v. Titus*, 7 B. I. 441; *Selph v. Howland*, 23 Miss. 264; *Spinning v. Blackburn*, 13 Ohio St. 131; *Pell v. Cole*, 2 Met. (Ky.) 252; *Hughes v. Peters*, 1 Cold. 67; *Washburn v. Burns*, 34 N. J. L. 18.

<sup>6</sup> *Patterson v. Flanagan*, 1 Ala. S. C. 427.

to by the husband; in others, it need not be. In some States, she can give the whole estate to persons other than her husband; in others, she can give only a part away from her husband. In the absence of a will by the wife, the husband takes all her personal property at her decease as at common law, and the use of her real estate for life, if there is issue born alive,<sup>1</sup> or, in some States, whether there is issue or not, and where there is no issue, a portion of her real estate in fee.<sup>2</sup>

§ 683. By force of the statutes in several States, married women may now be appointed trustees, guardians, executors, and administrators, and may give bonds for the faithful performance of their duties.<sup>3</sup> In many States the wife may sue without her husband for all matters touching her separate estate or contracts; she may submit to arbitration;<sup>4</sup> and in some States she may even sue her husband, like any stranger, in a court of law.<sup>5</sup>

§ 684. A married woman may sell any of her chattel interests, and take notes payable to herself, and the notes remain her personal property;<sup>6</sup> and if a note for the wife's property is taken in the name of the husband, she may, upon proving the fact, claim the proceeds,<sup>7</sup> and she may even hold a mortgage upon her husband's estate.<sup>8</sup>

<sup>1</sup> *Rawsom v. Nichols*, 22 N. Y. 110; *Brown v. Brown*, 6 Humph. 127; *Wilkinson v. Wright*, 6 B. Mon. 576.

<sup>2</sup> Mass. Stat.

<sup>3</sup> Stat. of Mass. 1869, c. 409; *Springer v. Berry*, 47 Maine, 330.

<sup>4</sup> *Palmer v. Davis*, 2 N. Y. 242.

<sup>5</sup> *Scott v. Scott*, 13 Ind. 225.

<sup>6</sup> *Nims v. Bigelow*, 45 N. H. 343; *Huff v. Wright*, 39 Ga. 49; *Cheever v. Wilson*, 9 Wall. 108; *Jay v. Long Island R. R.*, 2 Daly, 401.

<sup>7</sup> *Conrad v. Shomo*, 44 Penn. St. 193; *Buck v. Gibson*, 37 Vt. 653; *Baker v. Gregory*, 28 Ala. 544; *Mitchell v. Mitchell*, 20 N. J. Eq. 234; *Whitehead v. Whitehead*, 64 N. C. 538; *Lamplsey v. Watson*, 43 Ala. 377; *Marsh v. Marsh*, id. 677; *Molton v. Morton*, id. 651.

<sup>8</sup> *Power v. Lester*, 23 N. Y. 527; *Nims v. Bigelow*, 45 N. H. 343; *Bemis v. Call*, 10 Allen, 512.

§ 685. As a general rule, a wife cannot convey her real estate without her husband joining in the deed, or without his concurrence or assent in writing, as he is entitled to curtesy in her real estate. But this depends upon the construction of the statutes in each State;<sup>1</sup> under an early statute in Massachusetts, now repealed, a wife's sole deed of her real estate was held to be valid.<sup>2</sup> A married woman may now be bound by her covenants in the deed of her land, it being a contract in relation to her separate property;<sup>3</sup> and so a married woman may be compelled specifically to perform a contract to convey her land, provided the contract is executed according to the statute; for if a husband's written consent is necessary to a valid conveyance of her land, his written consent is necessary to a valid agreement to convey, and if that is wanting, the contract cannot be enforced.<sup>4</sup>

§ 686. If a married woman has no separate property, she can make no contracts, except as expressly provided by statute. Thus if a married woman, having no separate property, borrows money and gives a note, for the prospective purpose of purchasing land to her separate use, and afterwards purchases the land, and takes a deed in her own name, the note is void, as it is in no sense a contract in relation to her separate property.<sup>5</sup> But it is otherwise, if a direct purchase is made to herself, and a note given to the vendor of the land

<sup>1</sup> *Wright v. Brown*, 44 Penn. St. 224; *James v. Everly*, 3 Grant, 150; *Murphy v. Bright*, id. 296; *Camden v. Vail*, 23 Cal. 633; *Eaton v. George*, 42 N. H. 375; *Maclay v. Love*, 25 Cal. 367; *Miller v. Hine*, 13 Ohio St. 565; *Alexander v. Saulsbury*, 1 Ala. 436; *Pentz v. Simonson*, 13 N. J. Eq. 232; *Hough v. Blythe*, 20 Ind. 24; *Major v. Symmes*, 19 Ind. 117; *Dodge v. Hollinshead*, 6 Minn. 25; *Miller v. Wetherby*, 12 Iowa, 415; *Stoker v. Whitlock*, 3 Met. (Ky.) 244; *Myetsky v. Goery*, 2 Brews. 302.

<sup>2</sup> *Beal v. Warren*, 2 Gray, 447. See Mass. Gen. Stat. c. 108, § 3.

<sup>3</sup> *Basford v. Peirson*, 7 Allen, 524.

<sup>4</sup> *Baker v. Hathaway*, 5 Allen, 103; *Jewett v. Davis*, 10 id. 72; *Woodward v. Seaver*, 38 N. H. 29. And see *Rumfelt v. Clemens*, 46 Penn. St. 455.

<sup>5</sup> *Ames v. Foster*, 42 N. H. 381; *Dunning v. Pike*, 46 Maine, 461; *Johnson v. Chisson*, 14 Ind. 415; *Whitworth v. Carter*, 43 Miss. 61; *Dunbar v. Meyer*, id. 679.

for the purchase-money; for although, when the negotiation commenced, she had no separate property concerning which she could contract, yet, as soon as there was a conveyance to her separate use, she had title to separate property, and could make a valid contract by note or bond to pay the purchase-money.<sup>1</sup>

<sup>1</sup> *Chapman v. Foster*, 6 Allen, 136; *Bullin v. Dillage*, 37 N. Y. 35; *Darby v. Calligan*, 16 N. Y. 21; *Knapp v. Smith*, 27 N. Y. 277; *Estabrook v. Earle*, 97 Mass. 302; *Stewart v. Jenkins*, 6 Allen, 303; *Pember-ton v. Johnson*, 46 Mo. 342. But see *Carpenter v. Mitchell*, 50 Ill. 470.

## CHAPTER XXIII.

## TRUSTS FOR CHARITABLE USES.

- § 687. General remarks upon charitable trusts.
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- § 735. Trustees cannot be removed and changed by courts for the mere convenience of parties.
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- § 744. Remedies for a breach of trust by trustees. No reversion to heirs of the donor.
- § 745. Whether the statute of limitations runs against a charitable trust.
- § 746. Pleadings in charity suits need not be so accurate and formal as in suits to enforce private trusts.
- § 747. As to costs in charity suits.
- § 748. Charitable trusts in the several States. The cases collected and commented on in a note.

§ 687. TRUSTS for charitable uses form a large and important class of trusts. The questions that arise under this head are numerous, and often complicated and difficult of solution. Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick, and the afflicted; and all the gifts for the public convenience, benefit, utility, or ornament, in whatever manner the donors desire to have them applied. These trusts are governed in



many respects by the same rules that govern trusts for the private benefit of individuals or families. There must be the same proof of the due execution of a written instrument, whether it creates a public charity or a private trust, and in many respects the same rules of construction will apply, in order to determine the intention of the donor;<sup>1</sup> but if it is once determined that the donor intended to create a public charity, very different rules from those that are applied in establishing and administering private trusts will be applied, in order to give effect to the intention of the donor and establish the charity. Thus, if in a gift for private benefit the *cestuis que trust* are so uncertain that they cannot be identified, or cannot come into court and claim the benefit conferred upon them, the gift will fail, and result to the donor, his heirs or legal representatives. But if a gift is made for a public charitable purpose, it is immaterial that the trustee is uncertain, or incapable of taking, or that the objects of the charity are uncertain and indefinite. Indeed, it is said that vagueness is, in some respects, essential to a good gift for a public charity, and that a public charity begins where uncertainty in the recipient begins.<sup>2</sup> So if a gift for a private purpose tends to create a perpetuity, it will be void; but a gift for a public charity is not void, although in some forms it creates a perpetuity.<sup>3</sup> It is said that courts look with favor upon charitable gifts, and take special care to enforce them, to guard them from assault, and protect them from abuse. And certainly charity in thought, speech, and deed challenges the admiration and affection of mankind. Christianity teaches it as its crowning grace and glory; and an inspired apostle exhausts his powerful eloquence in setting forth its beauty, and the nothingness of all things without it. Charitable bequests are said to come within that department of human affairs where the maxim, *ut res magis valeat quam pereat*, has been, and should be applied.<sup>4</sup> The consti-

<sup>1</sup> *Ante*, § 88; *Olliffe v. Wells*, 130 Mass. 221.

<sup>2</sup> *Fontain v. Ravenel*, 17 How. 384; *Saltonstall v. Sanders*, 11 Allen, 458.

<sup>3</sup> *Odell v. Odell*, 10 Allen, 1; *Williams v. Williams*, 4 Selden, 533.

<sup>4</sup> *Saltonstall v. Sanders*, 11 Allen, 455.

tution of one State at least strictly enjoins all legislatures and magistrates in future periods to countenance and inculcate the principles of humanity and general benevolence, and public and private charity.<sup>1</sup>

§ 688. The origin of this peculiar form of jurisprudence has been a matter of much curious and learned speculation. It is not the object of this treatise to enter into such investigations, but to state the present condition of the law, for the benefit of those who are called upon to aid in its administration, and who have little time to spend upon collateral matters, however interesting. It may, however, in passing, be proper to suggest, that the same religious spirit and charitable sentiment which led individuals and communities to devote large sums of money to pious uses, religious houses, churches, and educational institutions, to the relief of the old and the poor, and to the general promotion of the public convenience, utility, and good, also led the makers and administrators of public laws to take a favorable and liberal view of such charitable donations.

§ 689. The early history of the law of charitable uses, like the early history of all the leading branches of the English or common law, is extremely obscure. That there were great charitable institutions, such as universities, colleges, and schools; and great religious houses, such as abbeys, monasteries, nunneries, and the like; that there were asylums and retreats for the poor and sick; and that almsgiving was common, is known; and that all these institutions were in some way established by the charity of pious men is known: but the beginning of these charitable foundations cannot be traced with certainty; nor is it easy to trace the history of the public laws by which they were encouraged, fostered, protected, and regulated. Among the early indications of the religious or charitable disposition of the people are the statutes of mortmain, so called, to prevent too large a proportion of the property of the realm from being given

<sup>1</sup> Constitution of Mass., c. 5, § 1.

to religious houses, or to a *dead hand*, where it could not be readily used in the increasing trade and commerce of the kingdom. Notwithstanding these prohibitory statutes, care was taken to enforce the employment of bequests for charitable purposes. An early statute sets forth that many hospitals, founded as well by noble kings of the realm, and lords and ladies, as by divers other estates to the honor of God and his glorious mother, in aid and merit of the souls of the said founders, to the which hospitals the said founders had given a great part of their movable goods for the building of the same, and a great part of their lands and tenements, therewith to sustain impotent men and women, lazars, men out of their wits, and poor women with child, and to nourish, relieve, and refresh other poor people in the same, were then for the most part decayed, and the goods and profits misemployed. The act, in providing a remedy, directs that, as to those hospitals which were of the patronage and foundation of the king, the ordinaries were to institute inquiries, and certify the inquiries into the king's chancery; and as to all other hospitals they were, after due inquiry, to make the necessary correction and reformation.<sup>1</sup>

§ 690. It is quite certain that the civil or Roman law was construed most indulgently, in favor of legacies and bequests for pious, charitable, and public uses, before the empire became Christian;<sup>2</sup> but it must be remembered that Christianity, and the charitable sentiments which it inculcates and begets, had widely spread among the people before the government publicly announced itself as Christian. (a) After the final conversion of the government to the Christian religion, legacies to pious uses, including legacies to works of piety and charity, whether they related to temporal or spir-

<sup>1</sup> 2 Hen. V. Stat. 1, c. 1.

<sup>2</sup> Dig. Lib. 33, tit. 2; De Usu et Usufruc. Legatorum, §§ 16, 17; L'd Ch. J. Wilmot, notes 53, 54.

(a) As to the extent to which mon law, see 29 Am. L. Reg. n. s. Christianity is a part of the com- 273; 32 Am. Law Rev. 547.

itual concerns, were deemed entitled to peculiar favor as privileged testaments.<sup>1</sup> It is not impossible, nor improbable, that the Christianized maxims of the civil law relating to pious and charitable trusts were transferred into the jurisprudence of England. Lord Thurlow, indeed, said that the doctrine of charities grew up from the civil law.<sup>2</sup> But it must be observed that, as soon as Christianity spread into Britain, the same ideas that modified the Roman law would be at work upon the public mind of England, and would mould and fashion the law and institutions of that country in the same way that they had influenced the civil law. It must also be remembered that for a long time the laws of England went much further than the civil law in devoting the estates of deceased persons to charity. For until the statute of distributions, 22 Car. II. c. 13, was enacted, the ordinary was obliged to apply a portion of the residue of every intestate estate to charity, on the ground that there was a general principle of piety and charity in every man.<sup>3</sup> If such was the English method of dealing with intestate estates, a method not derived from the civil law, certainly wills and grants, appointing or authorizing such charitable distributions, would meet with especial favor and indulgence in the courts.

§ 691. So deeply imbedded were these charitable institutions in the minds of the people, that Henry VIII., in his struggle against the supremacy of the pope, felt obliged to strike at all these religious and charitable foundations. It is true that abbeys, monasteries, and other religious houses were the principal sufferers; but some of the acts under which the king proceeded embraced colleges, chapels, chantries, hospitals, and fraternities;<sup>4</sup> and St. Thomas's Hospital in Southwark was actually surrendered.<sup>5</sup> It is further

<sup>1</sup> Domat, Civil Law, B. 4, tit. 2, § 6.

<sup>2</sup> *White v. White*, 1 Bro. Ch. 12; *Moggridge v. Thackwell*, 7 Ves. 36, 69; *Mills v. Farmer*, 1 Mer. 55, 94, 95; *Jackson v. Phillips*, 14 Allen, 539.

<sup>3</sup> 2 Bl. Com. 494, 495; Perkins, § 486; Tudor, Char. Uses, 210.

<sup>4</sup> 1 Burnet Hist. Reform. pp. 346, 347, 404-434; 33 Hen. VIII. c. 27.

<sup>5</sup> *Ibid.*

said that the great universities were obliged to petition the king that they might not be included under the general words of colleges and fraternities.<sup>1</sup> In this wide-spread attack upon the religious, educational, and alms-giving institutions of the kingdom, and in the confusion attending upon the transition from Papacy to Episcopacy, it cannot be doubted that all charities were much neglected, and that many of them abused or misemployed their funds. The short reign of Edward VI. and the disturbed reign of Philip and Mary tended rather to increase than to correct these abuses. But as soon as Elizabeth was firmly seated upon the throne, and the Reformation was assured, general attention was turned to the correction and encouragement of charities. In the first year of her reign, the act that restored the first-fruits to the crown exempted schools and hospitals from the payment thereof.<sup>2</sup> In the same act are provisions in favor of the universities, the colleges of Eton and Winchester, and the chapel of St. George. Soon after, statutes were passed, regulating leases of lands belonging to ecclesiastical and eleemosynary institutions. Acts were passed authorizing private individuals to establish and endow hospitals. The Stat. 14 Eliz. c. 14, forcibly illustrates the indulgence and encouragement which was extended to charitable gifts. It recited that certain hospitals had been erected by Henry VIII. and Edward VI., and that lands had been given by other persons, and it was hoped many more would likewise charitably give; and that many such gifts and assurances had been, and were likely to be, made by the last wills of the givers thereof; at which time, for want of counsel or other opportunities, it might happen that the right names of the said corporations should not be truly expressed, whereby some question might grow of the validity of such grants, gifts, or devises; and it was enacted, that all gifts, grants, legacies, devises, and assurances, made or to be made, of any lands, tenements, and hereditaments, by will, feoffment, or otherwise, to the use or for the relief of the poor in any hospital then remaining, and being *in esse*, and employed to the relief and maintenance of

<sup>1</sup> Ibid.<sup>2</sup> 1 Eliz. c. 4, §§ 34, 35, 40.

the poor in said hospitals, should be as good and available in law according to the true meaning of any such donor, as if the said corporations had been or were in writing, or deeds of such gifts, grants, devises, or assurances, or in such will or testament, rightly or truly named; saving to all third persons their rights and interests in the land given. The Stat. 31 Eliz. c. 6, remedied the abuses which had grown up in the elections and presentations to churches, colleges, schools, hospitals, societies, and other charitable organizations. The 39 Eliz. c. 6, authorized the queen to appoint a commission to inquire if grants or gifts to hospitals and other charitable uses were misemployed, and if so, to correct the abuses. The Statutes 8 Eliz. c. 11, 35 Eliz. c. 3, 39 Eliz. c. 4, 21, and 43 Eliz. c. 2 and 3, relate to a kind of compulsory charity or support of the poor. These statutes, and especially the Stat. 43 Eliz. c. 2, are said to be the foundation of the poor laws, so long in force in England; and to them we may trace the origin of the pauper laws in force in the various States of this country.<sup>1</sup>

§ 692. All this legislation for charity finally culminated in the Stat. 43 Eliz. c. 4 (1601), commonly called the statute of charitable uses. The charitable objects and purposes enumerated in this statute are as follows: "Relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars in universities; repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes."<sup>2</sup>

<sup>1</sup> See Boyle, pp. 1-12.

<sup>2</sup> The following abstract of the statute, as given by Boyle, is here inserted, as it is not readily accessible to all:—

"The preamble sets forth that property of every kind had been given,

Since the passage of this statute, all the objects named therein are considered charitable. There are also many other

limited, appointed, and assigned by the queen and other well-disposed persons, for some or other of the purposes there specified, of which the following is an enumeration : Relief of aged and impotent and poor people ; maintenance of sick and maimed soldiers and mariners ; schools of learning ; free schools ; scholars in universities ; houses of correction ; repair of bridges, ports, havens, causeways, churches, sea-banks, and highways ; education and preferment of orphans ; marriages of poor maids ; supportation and help of tradesmen, handicraftsmen, and persons decayed ; relief or redemption of prisoners or captives ; and aid or ease of any poor inhabitants concerning payment of fifteen, setting out of soldiers, and other taxes. It then recites that the lands and effects so appropriated had not been duly employed, and, for redress and remedy of such abuses and breaches of trust, proceeds to enact that it should be lawful for the Lord Chancellor, or Lord Keeper of the Great Seal, and for the Chancellor of the Duchy of Lancaster, within their respective jurisdictions, to award commissions to the bishop of the diocese and chancellor (in case there should be any bishop of that diocese at the time), and to other persons, authorizing them, or any four of them, to inquire as well by the oaths of twelve men, as by all other good and lawful ways and means, of all gifts, limitations, assignments, and appointments, and of the abuses, breaches of trust, misemployments, and misgovernment of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, or stocks of money, theretofore given, limited, appointed, or assigned, or which thereafter should be given, limited, appointed, or assigned, to or for any the charitable and godly uses before rehearsed. And that the commissioners, or any four of them (upon calling the parties interested in any such lands, &c.), should make inquiry by the oaths of twelve men or more of the county (the parties interested being allowed their challenge), and upon such inquiry, hearing and examining thereof, set down such orders, judgments, and decrees as the said lands, &c., might be duly and faithfully employed to and for such of the charitable and godly uses and intents before rehearsed respectively, for which they were given, limited, assigned, or appointed by the donors and founders thereof, which orders, judgments, and decrees, not being contrary or repugnant to the orders, statutes, or decrees of the donors or founders, should, by authority of the then parliament, stand firm and good according to the tenor and purport thereof, and should be executed accordingly, until the same should be undone or altered by the Lord Chancellor, or Lord Keeper, or the Chancellor of the County Palatine of Lancaster respectively, within their several jurisdictions, upon complaint by any party grieved to be made to them.

“ Sect. 2. It is then provided that the act should not extend to the two

uses, not named, and not within the strict letter of the statute, but which, coming within its spirit, equity, and analogy, are considered charitable.

universities, the colleges of Westminster, Eton, or Winchester, or to any cathedral or collegiate church.

"Sect. 3. Also that it should not extend to any city or town corporate, or to any lands or tenements given to the uses aforesaid within any such city or town corporate, where should be a special governor or governors to govern or direct such lands, tenements, or things disposed of to any the uses aforesaid; nor to any college, hospital, or free school, which should have special visitors or governors or overseers appointed them by their founders.

"Sect. 4. It is further provided that the jurisdiction or power of the ordinary should not be prejudiced.

"Sect. 5. That no person should be appointed or act as commissioner or juror who should have possession of or pretend title to any of the said lands or other property.

"Sect. 6. That *bona fide* purchasers without notice should not be impeached by the decrees or orders of the commissioners for or concerning their estate or interest in any lands, &c., given, limited, or appointed to charitable uses. But that, nevertheless, the commissioners should make decrees and orders for recompense to be made by any person or persons, who, being put in trust or having notice of the charitable use, should break the trust or defraud the use, and also against their heirs, executors, and administrators, having assets in law or equity, so far as the same assets would extend.

"Sect. 7. The act then proceeds to except, out of the authority vested in the commissioners, all lands and hereditaments in any manner assured or come to the queen's majesty, or to Henry VIII., Edward VI., or Queen Mary; but enacts, that, if any such should have been given, appointed, or assigned to charitable uses since the beginning of her majesty's reign, they should be within the scope of the commissioners' inquiry.

"Sect. 8. It then goes on to enact that all orders, judgments, and decrees of the commissioners should be certified under seal into the Court of Chancery, or into the Court of Chancery within the County Palatine of Lancaster, according to the jurisdiction, within such convenient time as should be limited in the commissions.

"Sect. 9. And that the Lord Chancellor, or Lord Keeper and the Chancellor of the Duchy, should within their several jurisdictions take such order for the due execution of all or any of the said judgments, decrees, and orders, as to either of them should seem fit and convenient.

"Sect. 10. The act lastly provides a remedy for persons aggrieved by the orders or decrees so certified by the commissioners, by declaring that complaint might be made to the Lord Chancellor, or Lord Keeper, or the Chancellor of the Duchy of Lancaster, for redress; and that upon such



§ 693. This statute has filled a large space in judicial inquiries; and it was supposed for a time that it was the origin of the jurisdiction of courts of equity over the subject of charities. There are few reports of cases determined in chancery prior to the time of Elizabeth; while there are few cases at law, in the argument and decision of which no reference was made to a jurisdiction in chancery.<sup>1</sup> These facts led Lord Loughborough to observe, that "it does not appear that this court, at that period, had cognizance upon informations for the establishment of charities. Prior to the time of Lord Ellesmere (1596), as far as the tradition of the times immediately following goes, there were no such informations as that upon which I am now sitting (an information to establish a charity); but they made out their case as well as they could at law."<sup>2</sup> The same facts and authorities led the Supreme Court of the United States to come to a similar conclusion.<sup>3</sup> (a)

complaint the said Lord Chancellor, or Lord Keeper, or the said Chancellor of the Duchy, might according to their several jurisdictions, by such course as to their wisdom should seem metest, the circumstances of the case considered, proceed to the examination, hearing, and determining thereof; and upon hearing thereof should and might amend, diminish, alter or enlarge the orders, judgments, and decrees of the commissioners, as should be thought to stand with equity and good conscience according to the true intent and meaning of the donors and founders; and should and might tax and award good costs of suit by their discretions against such persons as they should find to complain unto them without just and sufficient cause."

<sup>1</sup> Porter's Case, 1 Rep. 22 a; *Gibbons v. Maltyard*, Poph. 6; *Thetford School*, 8 Rep. 130; *The Skinners' Case*, Moore, 120, pl. 277; *Annis's Case*, Anderson, 43; *Perkins*, 563; *Bruerton's Case*, 6 Rep. 2; *Partridge v. Walker*, Duke, 360; *Hewett v. Wotton*, cited 4 Rep. 109 b; *Duke*, 469; *Chibnal v. Whitton*, 4 Rep. 110 a; *Martidall v. Martin*, Cro. Eliz. 288.

<sup>2</sup> *Att. Gen. v. Bowyer*, 3 Ves. 714, 726; *Ludlow v. Greenhouse*, 1 Bligh (N. S.), 61; *Att. Gen. v. Platt, Finch*, 221; 1 Ch. Ca. 267; *West v. Palmer*, id. 134; *Duke*, 379; *Collinson's Case*, Hob. 136; *Rolt's Case*, Moore, 888; *Mills v. Farmer*, 1 Mer. 55; *Moggridge v. Thackwell*, 7 Ves. 36.

<sup>3</sup> *Baptist Association v. Hart's Ex'rs*, 4 Wheat. 1.

(a) The only cases in which the *Baptist Ass'n v. Hart* were, like it, U. S. Supreme Court has followed from Virginia, where charities, ex-

§ 694. On the other hand, it is said that the statute does not purport to take away any authority from the court of chancery, or to give any new jurisdiction, but it only authorizes a commission to inquire into and correct abuses, allowing an appeal to the Lord Chancellor in certain cases. It is further said that the court of chancery, immediately after the statute, entertained original bills in charity cases, and seemed to refer its jurisdiction, not to the statute, but to its original and inherent jurisdiction over all matters of trust and confidence.<sup>1</sup> Still further, Lord Northington, Lord Hardwicke, Lord Eldon, Lord Redesdale, Sir Edward Sugden, as the Lord Chancellor of Ireland, Lord Chief-Justice Wilmot, Sir Joseph Jekyll, and Sir John Leach have expressed the clear opinion that the statute created no new law; that it simply created a new and ancillary jurisdiction by commission to issue out of chancery, to inquire whether funds devoted to charitable purposes had been misapplied.<sup>2</sup> But beyond this is the report of the commissioners of public records, published in 1827, 1830, and 1832. These records contain about fifty cases before the statute, in which the court of chancery had exercised a jurisdiction in establishing, regulating, and enforcing gifts and grants to charitable uses, very similar to the jurisdiction now exercised by courts in those States where the statute or the principles of the

<sup>1</sup> *Payne's Case*, Duke, 154; *Guiddy's Case*, 4 Jac. 1; *Blackston v. Henworth Hospital*, Duke, 644; 11 Jac. 1; *Henshaw v. Morpeth*, Duke, 142; *Mayor of London's Case*, id. 389; 1 Car. 15; *Att. Gen. v. Townsend*, Duke, 590; 22 Car. II.; *Chelmsford's Case*, Duke, 574.

<sup>2</sup> *Att. Gen. v. Dublin*, 1 Bligh (N. S.), 312, 347; *Att. Gen. v. Skinners' Co.*, 2 Russ. 407, 420; *Att. Gen. v. Brentwood School*, 1 Myl. & K. 376; *Incorporated Soc. v. Richards*, 1 Conn. & Laws. 58; 1 Dru. & War. 258; 4 Ir. Eq. 201; *Carie v. Bertie*, 2 Vern. 342; *Eyre v. Shaftesbury*, 2 P. Wms. 119; *Att. Gen. v. Locke*, 3 Atk. 165; *Att. Gen. v. Brereton*, 2 Ves. 425; *Att. Gen. v. Middleton*, id. 327; *Att. Gen. v. Tancred*, 1 Eden, 10; 1 W. Black. 90; *Att. Gen. v. Downing*, Wilmot's notes, 24. For charitable cases in chancery prior to the statute, see *Messenger v. Gloucester*, Tothill, 58; *Parrott v. Pawlett*, Carey, 103; *Elmer v. Scott*, Choice Cas. in Chan. 155; Duke, 131, 136, 163, 361; Tothill, 120.

cept in certain cases specified by extent than other trusts. Russell statute, are not upheld to a greater *v. Allen*, 107 U. S. 163, 168.

statute are in force.<sup>1</sup> Since the publication of these records, the matter has been again much discussed in the Supreme Court of the United States, and in other courts in America; and it is now conceded as settled, that courts of equity have an original and an inherent jurisdiction over charities, independent of the statute.<sup>2</sup> (a) The consequence of this final determination is important in this respect, that courts of equity, in the various States where they are not prohibited by statute, exercise an original, inherent jurisdiction in equity over charities, and apply to them the rules of equity, together with such other rules, applicable to charitable uses, as courts of equity may exercise under the constitutions and laws of the several States; and the courts do this by virtue of their inherent powers, without reference to the question whether the statute has been technically adopted in their States.<sup>3</sup>

§ 695. It was at one time doubted whether the statute had not ousted the court of original jurisdiction, and whether proceedings in relation to charities must not in all cases be

<sup>1</sup> For the convenience of those who desire to see these cases, we insert the pages of the "Proceedings in Chancery," where they may be found: Vol. I., pp. lvi, lvii, lxii, 81, 96, 98, 101, 134, 141, 159, 213, 216, 218, 225, 241, 257, 276, 282, 291, 308, 376, 378, 395-399; Vol. II., pp. xlv, 146, 271, 303, 430; Vol. III., pp. 67, 108, 169, 183, 197, 249, 252, 269, 286, 291, 292, 319. All that is contained in these cases is printed in full in Mr. Binney's argument in the Girard Case, pp. 151-160.

<sup>2</sup> *Vidal v. Girard's Ex'rs*, 2 How. 127; *Tappan v. Deblois*, 45 Maine, 122; *Going v. Emery*, 16 Pick. 107; *Jackson v. Phillips*, 14 Allen, 558; *Williams v. Williams*, 4 Selden, 533; *Att. Gen. v. Moore*, 19 N. J. Eq. 503; *Norris v. Thompson*, id. 307; *Walker v. Walker*, 25 Ga. 420; *Williams v. Pearson*, 38 Ala. 299; *State v. Prewett*, 20 Miss. 165; *Paschall v. Acklin*, 27 Texas, 173; *Chambers v. St. Louis*, 29 Mo. 543; *Att. Gen. v. Wallace*, 7 B. Mon. 611; *Franklin v. Armfield*, 2 Sneed, 305; *Urmry's Ex'rs v. Wooden*, 1 Ohio St. 160; *Sweeney v. Sampson*, 5 Ind. 465; *Gillman v. Hamilton*, 16 Ill. 225; *Grimes v. Harmon*, 35 Ind. 246; *Burr's Ex'rs v. Smith*, 7 Vt. 241; *Vidal v. Philadelphia*, 2 How. 128; *Ould v. Washington Hospital*, 95 U. S. 363.

<sup>3</sup> *Ibid.*

(a) See *Stuart v. Easton*, 74 F. R. 854.

commenced by commission; but there were proceedings by original bill from the beginning,<sup>1</sup> and the doubt was soon overruled and has disappeared from the books.<sup>2</sup>

§ 696. From this discussion, it appears that the statute, 43 Eliz. c. 4, accomplished three things in the law of charities: (1) It established an enumeration, or kind of definition, standard, or test, to which all gifts and grants in trust could be brought, in order to determine whether they were charitable. (2) It authorized a commission to inquire into the abuses and misemployment of funds and lands given to charity. But this proceeding by commission soon fell into disuse; and an original bill, or an information by the attorney general, became the only means of redress. (3) It repealed, *pro tanto*, all the statutes of mortmain in force before that time, so that there was no restriction in the laws of England upon gifts or grants for the purposes named in the statute, until the statute of mortmain, 9 Geo. II. c. 36.<sup>3</sup>

§ 697. It will be seen that the words "charity" and "a charitable use" have a somewhat technical meaning in the law. Mr. Webster, in his argument in the Girard Case, attempted to establish that a charity and a charitable use, in the eye of the law, must involve the idea of Christianity in some or all of its purposes, or at least must not be opposed to the common Christian faith, doctrine, and practice.<sup>4</sup> Mr. Binney, in his argument in the same case, defined a charitable or pious gift to be "whatever is given for the love of

<sup>1</sup> See *ante*, § 694.

<sup>2</sup> *Att. Gen. v. Newman*, 1 Ch. Cas. 157; 1 Lev. 284; *West v. Knight*, 1 Ch. Cas. 134; *Parish of St. Dunstan v. Beauchamp*, *id.* 193; *Anon. id.* 267; *Eyre v. Shaftesbury*, 2 P. Wms. 119; *Att. Gen. v. Brereton*, 2 Ves. 425, 427.

<sup>3</sup> *Magill v. Brown*, Brightly, N. P. 575; *Hobart*, 136.

<sup>4</sup> 6 Webster's Works, 133; *Bedford Charity*, 2 Swanst. 529; 1 Vern. 293; *Dane*, Abr. Ch. 219; *King v. Wilson*, 2 Strange, 834; *Taylor's Case*, 3 Mer. 405; *Evans v. London*, 2 Burns' Ecc. L. 95; *Att. Gen. v. Mansfield*, 2 Russ. 501; *Att. Gen. v. Cullum*, 1 Yo. & Col. 411; *Updegraph v. Com.*, 11 S. & W. 394; *Zeisweiss v. James*, 63 Penn. St. 465.

God, or for the love of your neighbor in the catholic and universal sense, — given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, and selfish.”<sup>1</sup> The word “charity,” in its *widest* sense, denotes all the good affections men ought to bear toward each other; in a more restricted sense, it means relief or alms to the poor; but in a court of chancery the signification of the word is derived from the statute of Elizabeth.<sup>2</sup> Hence it has been said that those purposes are considered charitable which are enumerated in the statute, or which by analogy are deemed within its spirit or intendment.<sup>3</sup> Another short but practical definition has described it as “a gift to a general public use, which extends to the poor as well as the rich.”<sup>4</sup> But Mr. Justice Gray has given a definition which includes all the facts and circumstances, and all varieties of charity under the law, and leaves nothing to be desired. In his words, “a charity in a legal sense may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, — either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.”<sup>5</sup>

§ 698. A bequest in trust for the poor inhabitants of a particular place, parish, or town is a charitable trust for the poor not receiving parochial or municipal aid and relief as

<sup>1</sup> Girard Case, Mr. Binney’s argument, 41; Price v. Maxwell, 28 Penn. St. 35.

<sup>2</sup> Tudor, Char. Uses, 4 (2d ed.).

<sup>3</sup> Morice v. Bishop of Durham, 9 Ves. 405; 10 Ves. 541.

<sup>4</sup> Jones v. Williams, Amb. 652; Coggeshall v. Pelton, 7 Johns. Ch. 294; Mitford v. Reynolds, 1 Phil. 191; Perin v. Carey, 24 How. 506; Miller v. Porter, 53 Penn. St. 300; Everett v. Carr, 59 Maine, 335.

<sup>5</sup> Jackson v. Phillips, 14 Allen, 556.

paupers: on the ground that the charity is for the poor, and not for the rich; and if it was applied to the maintenance of those supported by the parish, town, or county, it would relieve wealthy tax-payers from their taxes, and not materially aid the poor.<sup>1</sup> There can be no clear distinction drawn in such cases; for to aid the poor may save them from the parish or town, and thus relieve wealthy tax-payers from burdens that would otherwise fall upon them. Generally, the intention of the donor will guide in the distribution of his bounty, as he may see fit to add some comforts to the meagre support of town or parish, or he may confine his alms to those not receiving public aid.<sup>2</sup> In the absence of all directions, it may be as well to confine the charity to those not in the public almshouse, unless the gift is in aid of the poor-rates.<sup>3</sup>

§ 699. Thus the following gifts for the poor have been held to be charitable within the letter or spirit of the statute, or within the law of charities, as administered in several of the States: a gift to the poor indefinitely;<sup>4</sup> (a) or to a particular parish or place;<sup>5</sup> or workhouse;<sup>6</sup> or hospital;<sup>7</sup> or to the

<sup>1</sup> *Att. Gen. v. Clarke*, Amb. 422; *Rogers v. Rogers*, 2 Keen, 8; *Att. Gen. v. Wilkinson*, 1 Beav. 373; *Att. Gen. v. Bobill*, 1 Phil. 768; *Att. Gen. v. Exeter*, 2 Russ. 53, 359; *Att. Gen. v. Brandreth*, 1 Yo. & Col. Ch. 200; *Hereford v. Adams*, 7 Ves. 324; *Att. Gen. v. Price*, 3 Atk. 110; *McIntire v. Zanesville*, 17 Ohio St. 352; *Bruce v. Presbytery, &c.*, 1 H. L. Scot. 96; *Fisk v. Att. Gen.*, L. R. 4 Eq. 521.

<sup>2</sup> *Webb v. Neal*, 5 Allen, 575; *Att. Gen. v. Blizard*, 21 Beav. 233.

<sup>3</sup> *Doe v. Howells*, 2 B. & Ad. 744.

<sup>4</sup> *Att. Gen. v. Mathews*, 2 Lev. 167; *Att. Gen. v. Peacock*, Finch, 245; Amb. 422; *Att. Gen. v. Rance*, id.; *Legge v. Afgill*, Turn. & Russ. 265, n.; *Howard v. American Peace Soc.*, 49 Me. 288.

<sup>5</sup> *Att. Gen. v. Blizard*, 21 Beav. 233; *Bristow v. Bristow*, 5 Beav. 239;

<sup>6</sup> *Att. Gen. v. Vint*, 3 De G. & Sm. 704.

<sup>7</sup> *Corp. of Reading v. Lane*, Duke, 81; *Att. Gen. v. Kell*, 2 Beav. 575; *Helham v. Anderson*, 2 Eden, 296.

(a) See *In re Darling*, [1896] 1 Mass. 400; *Bullard v. Chandler*, 149 Ch. 50; *In re Buck*, [1896] 2 Ch. Mass. 532; *Wheelock v. Am. Tract* 727; *In re Dudgeon*, 74 L. T. 613; *Society*, 109 Mich. 141; *Farrington* *Hearns v. Waterbury Hospital*, 66 v. Putnam, 90 Maine, 405; *Ross v. Conn.* 98; *Weber v. Bryant*, 161 Ross, 25 Can. S. C. 307.

poor emigrating to a particular colony<sup>1</sup> or place;<sup>2</sup> or to the most deserving poor of a city;<sup>3</sup> or to a parish generally;<sup>4</sup> or to the governors of a hospital;<sup>5</sup> or to the widows and orphans of a parish;<sup>6</sup> or to the widows and seamen of a town;<sup>7</sup> (a) or for poor and pious persons;<sup>8</sup> or to such poor housekeepers as A. should appoint;<sup>9</sup> or to the indigent residents of certain towns, to be selected by the trustees;<sup>10</sup> or to distribute groceries, clothing, fuel, and alms among the

*Att. Gen. v. Wilkinson*, 1 Beav. 370; *Woodford v. Parkhurst*, Duke, 70; *Att. Gen. v. Clarke*, Amb. 422; *Att. Gen. v. Old South Soc.*, 13 Allen, 474; *State v. Gerard*, 2 Ired. Eq. 210; *Overseers v. Tayloe*, Gilm. 336; *Shotwell v. Mott*, 2 Sand. Ch. 46; *Att. Gen. v. Bovill*, 1 Phil. 762; *In re Lambeth Charities*, 22 L. J. Ch. 959; *Att. Gen. v. Trinity Church*, 9 Allen, 422; *Att. Gen. v. Hotham, Turn. & Russ.* 209; *Att. Gen. v. Webster*, L. R. 20 Eq. 483; *Rogers v. Thomas*, 2 Keen, 8.

<sup>1</sup> *Barclay v. Maskelyne*, 4 Jur. (N. S.) 1294; *Johns. Ch. (Eng.)* 124.

<sup>2</sup> *Chambers v. St. Louis*, 29 Mo. 543.

<sup>3</sup> *Hesketh v. Murphy*, 35 N. J. Eq. 23.

<sup>4</sup> *West v. Knight*, 1 Ch. Ca. 134; *Champion v. Smith*, Duke, 81; *Att. Gen. v. Johnson*, Amb. 190, n.

<sup>5</sup> *Mayor of London's Case*, Duke, 83.

<sup>6</sup> *Att. Gen. v. Comber*, 2 Sim. & S. 93; *Att. Gen. v. Glegg*, Amb. 584, 585, n.; 1 Atk. 356; *Att. Gen. v. Speed*, West, Ch. 491; *Cook v. Duckenfield*, 2 Atk. 562, 567.

<sup>7</sup> *Powell v. Att. Gen.*, 3 Mer. 48; *Urmeys Ex'rs v. Wooden*, 1 Ohio St. 160.

<sup>8</sup> *Nash v. Morely*, 5 Beav. 177.

<sup>9</sup> *Att. Gen. v. Pearce*, 2 Atk. 87; *Barnard*, Ch. 208.

<sup>10</sup> *Shotwell v. Mott*, 2 Sand. Ch. 46; *Hereford v. Adams*, 7 Ves. 324; *Paice v. Canterbury*, 14 Ves. 364; *Waldo v. Caley*, 16 Ves. 206; *Com. of Char. Donations v. Sullivan*, 1 Dr. & War. 501; 4 Ir. Eq. 280.

(a) A bequest to a town for "the poor widows, and children under ten years of age" is valid, as they can be easily ascertained. *Towle v. Nesmith* (N. H.), 42 Atl. 900. See *Pratt v. Roman Cath. Orphan Asylum*, 46 N. Y. S. 1035; *Conklin v. Davis*, 63 Conn. 377; *Strong's App.*, 68 id. 527; *Beurhaus v. Cole*, 94 Wis. 617; *Wood v. Paine*, 66 F. R. 807; *Trim's Estate*, 168 Penn. St. 395; *Sheldon v. Stockbridge*, 67 Vt. 299; *Hoffen's Estate*, 70 Wis. 522.

In New York, a bequest "for the support of the poor" of a certain town is held invalid, both because the town cannot take and the beneficiaries are uncertain. *Fosdick v. Hempstead*, 125 N. Y. 581; 126 id. 651; *In re Botsford*, 52 N. Y. S. 238.

poor;<sup>1</sup> or for the relief of the destitute in such manner as charity is usually distributed by the ministers-at-large in the city of Boston;<sup>2</sup> or to twenty aged widows and spinsters of the parish.<sup>3</sup> Gifts for the poorer classes have been sustained; as, for letting out land at a low rent,<sup>4</sup> or for deserving literary men who have been unsuccessful.<sup>5</sup> So trusts for poor relations have been considered charitable, and will be confined to such poor relations as are next of kin under the statute of distributions; and poor relations becoming rich, and the representatives of poor relations, will be excluded:<sup>6</sup> but where the trust is of a perpetual character, it will extend to all the poor relations of the donor, and will not be confined to those within the statute of distributions.<sup>7</sup> Trusts for releasing poor debtors and for the relief of decayed tradesmen are charitable.<sup>8</sup> So of a bequest to ten worthy men for the purchase of meat and wine fit for the service of two nights of the passover;<sup>9</sup> or for poor members of the Friends' Society, and for the relief of Indians.<sup>10</sup> So a bequest in aid of objects or purposes of charity, public or private, was held to be for the general relief of the poor.<sup>11</sup> A

<sup>1</sup> *Washburn v. Sewell*, 9 Met. 280; *Grandom's Estate*, 6 Watts & S. 537.

<sup>2</sup> *Derby v. Derby*, 4 R. I. 414.

<sup>3</sup> *Thompson v. Corby*, 27 Beav. 649; *Russell v. Kellett*, 3 Sm. & Gif. 264.

<sup>4</sup> *Crafton v. Frith*, 15 Jur. 737; 2 L. J. (N. S.) Ch. 198.

<sup>5</sup> *Thompson v. Thompson*, 1 Col. C. C. 395; *Shotwell v. Mott*, 2 Sand. Ch. 46.

<sup>6</sup> *Brunsdon v. Woolledge*, Amb. 507; *Green v. Howard*, 1 Bro. Ch. 31, n.; *Harding v. Glyn*, 1 Atk. 169; *Mahon v. Savage*, 1 Sch. & Lef. 111; *Swasey v. Amer. Bible Soc.*, 57 Me. 527; *Smith v. Harrington*, 4 Allen, 566; *Gillam v. Taylor*, L. R. 16 Eq. 581; *Att. Gen. v. Northumberland*, 7 Ch. D. 745.

<sup>7</sup> *White v. White*, 7 Ves. 423; *Isaac v. De Friez*, 17 Ves. 373, n.; Amb. 595; *Att. Gen. v. Bucknall*, 2 Atk. 328; *Att. Gen. v. Price*, 17 Ves. 371; *Tudor*, Char. 7.

<sup>8</sup> *Att. Gen. v. Ironmongers' Co.*, 2 Myl. & K. 576; 10 Cl. & Fin. 908; *Att. Gen. v. Painters' Co.*, 2 Cox, 51.

<sup>9</sup> *Straus v. Goldsmid*, 8 Sim. 614.

<sup>10</sup> *Magill v. Brown*, Brightly, 347.

<sup>11</sup> *Saltonstall v. Sanders*, 11 Allen, 446; *Dolan v. Macdermot*, L. R. 3 Ch. 676.



gift "in aid of the poor-rates,"<sup>1</sup> or to support schools and the poor of a county, is charitable.<sup>2</sup>

§ 700. Education and schools of learning of all grades are referred to in the statute, and almost all gifts for educational purposes are held to be charitable;<sup>3</sup> (a) as, gifts for the advancement of learning in every part of the world, so far as circumstances will permit;<sup>4</sup> or for the diffusion (a part in Pennsylvania, the residue in the United States) of useful knowledge and instruction among the institutes, clubs, or meetings of the working-classes, or manual laborers by the sweat of their brow;<sup>5</sup> to build or erect a school or free-grammar-school,<sup>6</sup> or a school for the sons of gentlemen;<sup>7</sup> for the education of the scholars of poor people in a particular

<sup>1</sup> *Doe v. Howells*, 2 B. & Ad. 744.

<sup>2</sup> *Heuser v. Harris*, 42 Ill. 425.

<sup>3</sup> *Jackson v. Phillips*, 14 Allen, 552; *Swasey v. Amer. Bible Soc.*, 57 Me. 527; *Tainter v. Clark*, 5 Allen, 66; *Andrews v. Andrews*, 110 Ill. 231; *Board of Ed. v. Bakewell*, 122 Ill. 339.

<sup>4</sup> *Whicker v. Hume*, 1 De G., M. & G. 506; 7 H. L. Cas. 124; 10 Eng. L. & Eq. 73; 14 Beav. 509.

<sup>5</sup> *Sweeney v. Sampson*, 5 Ind. 405.

<sup>6</sup> *Hadley v. Hopkins Acad.*, 14 Pick. 241; *State v. McGowen*, 2 Ired. Eq. 9; *Rugby School, Duke*, 80; *Gibbons v. Maltyard*, Poph. 6; *Att. Gen. v. Williams*, 4 Bro. Ch. 525; *Att. Gen. v. Bowles*, 2 Ves. 547; *Wright v. Lynn*, 9 Penn. St. 433; *Griffin v. Graham*, 1 Hawks, 96.

<sup>7</sup> *Att. Gen. v. Lonsdale*, 1 Sim. 109.

(a) Gifts for schools or public libraries are now generally regarded as charitable. *Crerar v. Williams*, 145 Ill. 625; *Cary Library v. Bliss*, 151 Mass. 364; *Quincy v. Att. Gen.*, 160 Mass. 431; *St. Paul's Church v. Att. Gen.*, 164 Mass. 188; *Att. Gen. v. Briggs*, id. 561; *Phillips v. Harrow*, 93 Iowa, 92; *Duggan v. Slocum*, 83 F. R. 244; 92 id. 806; *John v. Smith*, 91 id. 827; *Handley v. Palmer*, id. 948; *People v. Cogswell*, 113 Cal. 129; *Bedford v. Bedford*, 99 Ky. 273. Education is a proper subject of charity, although public education is provided for by law. *Green v. Blackwell* (N. J. Eq.) 35 Atl. 375; *Sawtelle v. Witham*, 94 Wis. 412; *In re John's Will*, 30 Oregon, 494; *No. Car. School v. No. Car. Inst'n*, 117 N. C. 164. The education must not be merely for private gain. *Spence v. Widney* (Cal.), 46 Pac. 463; *State v. Ausmus* (Tenn.), 35 S. W. 1021.

county;<sup>1</sup> or to maintain a schoolmaster;<sup>2</sup> or for the masters and fellows of a college;<sup>3</sup> or for the foundation of a scholarship,<sup>4</sup> fellowship,<sup>5</sup> or lectureship<sup>6</sup> in a college or university;<sup>7</sup> or for the perpetual endowment of two schools;<sup>8</sup> or to establish a college for orphans, although all ministers are forever excluded from its walls;<sup>9</sup> or for the education of young men at Oxford for the Church of England, to be selected;<sup>10</sup> or to maintain a library and reading-room;<sup>11</sup> or for paying premiums for the most important discoveries or useful improvements made public upon light and heat;<sup>12</sup> or for the civilization of Indians;<sup>13</sup> or to assist literary persons in their pursuits, or to publish an essay on science;<sup>14</sup> or to publish and distribute the works of Joanna Southcote;<sup>15</sup> or to promote the moral, intellectual, and physical instruction and education of a city;<sup>16</sup> or to create a "change of sentiment," which means to educate;<sup>17</sup> or a fund to increase the salaries

<sup>1</sup> *Clement v. Hyde*, 50 Vt. 716.

<sup>2</sup> *Hynshaw v. Morpeth*, Duke, 69.

<sup>3</sup> *Platt v. St. John's Coll.*, Duke, 77.

<sup>4</sup> *Rex v. Newman*, 1 Lev. 244; *Att. Gen. v. Andrew*, 3 Ves. 633.

<sup>5</sup> *Case of Jesus Coll.*, Duke, 78; *Att. Gen. v. Bowyer*, 3 Ves. 714.

<sup>6</sup> *Att. Gen. v. Margaret and Regius Professors in Cambridge*, 1 Vern. 55.

<sup>7</sup> *Porter's Case*, 1 Rep. 25, b; *Att. Gen. v. Wharwood*, 1 Ves. 537; *Christ's Coll.*, Cambridge, 1 Eden, 10; *Amb.* 351; 1 Black. 90.

<sup>8</sup> *Kirkbank v. Hudson*, 7 Price, 213; *Att. Gen. v. Williams*, 4 Bro. Ch. 526.

<sup>9</sup> *Vidal v. Girard's Ex'rs*, 2 How. 127; *Miller v. Atkinson*, 63 N. C. 537.

<sup>10</sup> *In re Well Beloved Weeks*, 7 Eng. L. & Eq. 73.

<sup>11</sup> *Drury v. Natick*, 10 Allen, 169; *Jackson v. Phillips*, 14 Allen, 552; *Pickering v. Shotwell*, 10 Barr, 23; *Cottman v. Grace*, 41 Hun, 345.

<sup>12</sup> *American Acad. v. Harvard Coll.*, 12 Gray, 584.

<sup>13</sup> *Magill v. Brown*, Brightly, 347.

<sup>14</sup> *Thompson v. Thompson*, 1 Coll. N. C. C. 395.

<sup>15</sup> *Thornton v. Howe*, 31 Beav. 14.

<sup>16</sup> *Lowell's App.*, 22 Pick. 215; *Pickering v. Shotwell*, 10 Penn. St. 27; *Whicher v. Hume*, 7 H. L. Cas. 124; *Marsh v. Means*, 3 Jur. (N. S.) 790; *Hartshorne v. Nicholson*, 4 Jur. (N. S.) 864; *Barclay v. Maskelyne*, id. 1294; see *Briggs v. Hartley*, 14 Jur. 683.

<sup>17</sup> *Jackson v. Phillips*, 14 Allen, 552.

of teachers.<sup>1</sup> Money in trust to support a school for the use of poor children cannot be applied to a public school where rich and poor are educated together; but it may be used in purchasing food and clothing and books for poor children, to enable them to attend such school.<sup>2</sup>

§ 701. The only reference that the statute makes to religious uses as charitable is to the "repair of churches." Sir Francis Moore says that the omission was intentional, in order to avoid confiscations in case the Reformation went backwards. But, in a Christian community of whatever variety of faith and form of worship, there would be little need of a statute to declare gifts for religious uses to be charitable. (a) Therefore, both before and since the statute, gifts for the advancement, spread, and teaching of Christianity,<sup>3</sup> or for the convenience and support of worship, or of the ministry, have been held charitable;<sup>4</sup> as gifts for the

<sup>1</sup> Price v. Maxwell, 28 Penn. St. 23.

<sup>2</sup> McIntire v. Zanesville, 17 Ohio St. 352.

<sup>3</sup> Andrews v. Andrews, 110 Ill. 228.

<sup>4</sup> Anon. Ander. 43, pl. 108; Pitt v. James, Hob. 123; Cheney's Case, Co. Litt. 342; 1 Cox, 316; Gibbons v. Maltby, Poph. 6; Moore, 594; Porter's Case, 1 Rep. 26 a, n.; Bruerton's Case, 6 Rep. 1 b, 2 a; Barrey v. Ley, Dwight's Char. Ca. 92; Att. Gen. v. Downing, Wilmot, 15; Bridgman's Duke, 125, 154; Magill v. Brown, Brightly, 380, 381; Jackson v. Phillips, 14 Allen, 552, 553; Baker v. Dutton, Keen, 224, 232; Att. Gen. v. Jolly, 1 Rich. 99.

(a) *In re Hunter*, [1897] 2 Ch. 21; *In re Darling*, [1896] 1 Ch. 50; 105; *In re Delmar's Trust*, [1897] People v. Fitch, 39 N. Y. S. 926; 2 Ch. 163; *In re Scowcroft*, [1898] People v. Cogswell, 113 Cal. 129. 2 Ch. 638; *Ross's Charity*, [1899] In Massachusetts, it is held that a bequest to trustees for the purpose of purchasing a lot and building a chapel in the town of C., in Ireland, to "forever be used for purposes of public worship under the auspices of the Roman Catholic Church," is a gift for a public charitable use. 1 Ch. 21; *In re Brown*, [1898] 1 Ir. R. 423; *Alden v. St. Peter's Parish*, 158 Ill. 631; *Mack's Appeal (Md.)*, 41 Atl. 242; *Christ Church v. Trustees*, 67 Conn. 554. A charity in the legal sense may exist for purposes which are both eleemosynary and ecclesiastical or religious. *In re Perry's Almshouses*, [1897] 1 Ch. 341. *Teele v. Bishop of Derry*, 168 Mass.

good,<sup>1</sup> or reparation, furniture, or ornament of a parish church;<sup>2</sup> or to a minister for preaching;<sup>3</sup> or for a pension to a perpetual curate;<sup>4</sup> or for unbeneficed curates;<sup>5</sup> or for augmentations of ecclesiastical persons to small vicarages and curacies;<sup>6</sup> or to Queen Anne's bounty;<sup>7</sup> or for the advancement of Christianity among infidels;<sup>8</sup> for foreign missions;<sup>9</sup> for the dissemination of the gospel at home and abroad;<sup>10</sup> "for the service of my Lord and Master;"<sup>11</sup> "to be disposed of for the benefit or advancement of such societies, subscriptions, or purposes having regard to the glory of God in the spiritual welfare of his creatures, as they in their discretion shall see fit;"<sup>12</sup> or for keeping the chimes of a church in repair;<sup>13</sup> or for payment of the singers;<sup>14</sup> or for keeping up an organ and paying the organist;<sup>15</sup> or for distributing Bibles and religious books and tracts;<sup>16</sup> or for "the uses of a Sunday-

<sup>1</sup> Wingfield's Case, Duke, 80; Anon., Carey, 39; Nash's Charity, Dwight's Char. Ca. 114.

<sup>2</sup> *In re* Church of Donington-on-Baine, 6 Jur. (N. S.) 290; Att. Gen. v. Vivian, 1 Russ. 226; Att. Gen. v. Ruper, 2 P. Wms. 125; Magill v. Brown, Brightly, 347.

<sup>3</sup> Gibbons v. Maltyard, Poph. 6; Pember v. Inh. of Knighton, Duke, 82; Poph. 139; Penstred v. Payer, Duke, 82; 1 Eq. Ca. 95; Duke, 131, 132.

<sup>4</sup> Att. Gen. v. Parker, 1 Ves. 43; 14 Ves. 7.

<sup>5</sup> Pennington v. Buckley, 6 Hare, 453.

<sup>6</sup> Att. Gen. v. Brereton, 2 Ves. 426.

<sup>7</sup> Widmore v. Woodroffe, Amb. 636; 1 Bro. Ch. 13, n.; Middleton v. Clithrow, 3 Ves. 734.

<sup>8</sup> Att. Gen. v. London, 1 Ves. Jr. 243; 3 Bro. Ch. 171.

<sup>9</sup> Bartlett v. King, 12 Mass. 537; Soc. for Propagating the Gospel v. Att. Gen., 3 Russ. 142; Fairbanks v. Lamson, 99 Mass. 533. See Bridges v. Pleasants, 4 Ired. Eq. 26.

<sup>10</sup> Att. Gen. v. Wallace, 7 B. Mon. 611; Burr v. Smith, 7 Vt. 241; Widmore v. Woodroffe, Amb. 636; Middleton v. Spicer, 1 Bro. Ch. 201.

<sup>11</sup> Going v. Emery, 16 Pick. 107; Powerscourt v. Powerscourt, 1 Moll. 616.

<sup>12</sup> Townsend v. Carus, 3 Hare, 267; Helan v. Russell, 4 Ir. Eq. 701.

<sup>13</sup> Turner v. Ogden, 1 Cox, 316.

<sup>14</sup> Ibid.

<sup>15</sup> Att. Gen. v. Oakaver, 1 Ves. 535.

<sup>16</sup> Att. Gen. v. Stepney, 10 Ves. 22; Winslow v. Cummings, 3 Cush.

school and for the diffusion of Christian principles;"<sup>1</sup> or for a Sunday-school library;<sup>2</sup> or for the use of Catholic priests in or near London;<sup>3</sup> or to promote the knowledge of the Catholic religion among the poor and ignorant inhabitants of S.;<sup>4</sup> or for establishing a bishopric in America;<sup>5</sup> or "to a theological seminary for a permanent fund to be applied to the education of pious and indigent youth for the ministry, who adhere to the Westminster Confession of Faith;"<sup>6</sup> or for preaching, in places named, the Gospel, as taught by the people known as Disciples of Christ;<sup>7</sup> or for preaching a sermon on Ascension Day;<sup>8</sup> or to a church, to be laid out in bread for the poor;<sup>9</sup> or for the benefit of ministers of the gospel;<sup>10</sup> or for the support and propagation of religion.<sup>11</sup> Whether a gift to secure prayers for souls in purgatory is a charity, *quære*.<sup>12</sup> It will vary in the different States. In Minnesota it would seem that a trust for religious purposes will not be sustained under the statutes of that State. If there is one in whom the statute of uses can execute the use the title will pass, otherwise the deed of trust will be void.<sup>13</sup>

358; *Bliss v. American Bible Society*, 2 Allen, 334; *Pickering v. Shotwell*, 10 Barr, 32.

<sup>1</sup> *Morville v. Fowle*, 144 Mass. 109.

<sup>2</sup> *Fairbanks v. Lamson*, 99 Mass. 553.

<sup>3</sup> *Att. Gen. v. Gladstone*, 13 Sim. 7.

<sup>4</sup> *West v. Shuttleworth*, 2 Myl. & K. 684.

<sup>5</sup> *Att. Gen. v. Bishop of Chester*, 1 Bro. Ch. 444; *Habershon v. Var- don*, 7 Eng. L. & Eq. 228; 4 De G. & Sm. 467.

<sup>6</sup> *McCord v. Ochiltree*, 8 Blackf. 15; *Att. Gen. v. Lawes*, 8 Hare, 32.

<sup>7</sup> *Sowers v. Cyrenius*, 39 Ohio St. 29.

<sup>8</sup> *Turner v. Ogden*, 1 Cox, 316; *Durour v. Motteux*, 1 Ves. 320.

<sup>9</sup> *Whitman v. Lex*, 17 S. & R. 88.

<sup>10</sup> *Att. Gen. v. Gladstone*, 13 Sim. 7; *Thornber v. Wilson*, 3 Drew. 245; 4 Drew. 350; *Att. Gen. v. Hickman*, 2 Eq. Ca. Ab. 193; *Att. Gen. v. Cock*, 2 Ves. 273; *Att. Gen. v. Lawes*, 8 Hare, 32; *Grievess v. Case*, 4 Bro. Ch. 67; *Weller v. Child*, Amb. 524; *Bishop Gore's Charity*, 4 Dru. & War. 270.

<sup>11</sup> *Beckwith v. St. Philip's Parish*, 69 Ga. 564.

<sup>12</sup> *Holland v. Alcock*, 108 N. Y. 312.

<sup>13</sup> *Little v. Willford*, 31 Minn. 173.

§ 702. It is to be observed that gifts to teach or propagate any faith or practice contrary to the established church of the kingdom were for a long time illegal; and such gifts could not be sustained, as charities, for the purposes for which they were given.<sup>1</sup> Even now, gifts to aid in re-establishing the supremacy of the pope are contrary to public policy and void;<sup>2</sup> but gifts to dissenting societies, though their teaching is contrary to that of the established church, are now carried into effect as charitable.<sup>3</sup> At all times, gifts for the relief, comfort, and education of dissenters,<sup>4</sup> or Catholics,<sup>5</sup> or Jews,<sup>6</sup> not connected with the propagation of their faith, were considered charitable.<sup>7</sup>

§ 703. It is further to be remarked, that a gift to a priest or minister in his public office, to be used by him for such public, religious, and charitable purposes as he sees fit, will be held to be charitable: but it must be a gift to the donee in his official capacity, to be expended for public charitable purposes; for if it is a gift to the person, or individual in his private capacity, for his individual benefit and relief, it will not be charitable, though the individual is described by his official character.<sup>8</sup>

<sup>1</sup> *De Themmines v. De Bonneval*, 5 Russ. 288; *Da Costa v. De Pas*, Amb. 228; 1 Dick. 258; *Att. Gen. v. Baxter*, 1 Vern. 248; 2 Vern. 105; 1 Eq. Cas. Ab. 96, pl. 9; *Doe v. Hawthorn*, 2 B. & Ald. 96; *West v. Shuttleworth*, 2 Myl. & K. 684; *Briggs v. Hartley*, 14 Jur. 683; *Blundell's Trust*, 30 Beav. 360.

<sup>2</sup> *De Themmines v. De Bonneval*, 5 Russ. 288.

<sup>3</sup> *Att. Gen. v. Pearson*, 2 Mer. 353; *Att. Gen. v. Hickman*, 2 Eq. Cas. Ab. 193; *Shrewsbury v. Hornbury*, 5 Hare, 406; *Att. Gen. v. Lawes*, 8 Hare, 32; *Att. Gen. v. Cock*, 2 Ves. 273.

<sup>4</sup> *Att. Gen. v. Baxter*, 1 Vern. 248; 2 Vern. 105; 1 Eq. Cas. Ab. 96; *Att. Gen. v. Lawes*, 8 Hare, 32; *Weller v. Childs*, Amb. 524; *Bishop Gore's Charity*, 4 Dru. & War. 270; *Wellbeloved v. Jones*, 1 Sim. & St. 40.

<sup>5</sup> *West v. Shuttleworth*, 5 Myl. & K. 684; *Att. Gen. v. Gladstone*, 13 Sim. 7.

<sup>6</sup> *Straus v. Goldsmid*, 8 Sim. 614.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Thornton v. Wilson*, 3 Drew. 245; 4 Drew. 350, 357; *Doe v. Aldridge*, 336.

§ 704. The statute names the repair of bridges, ports, havens, causeways, sea-banks, and highways as charitable, and also the aid and ease of poor people in the payment of taxes; consequently, gifts for the general comfort, ease, and convenience of the people, rich as well as poor, are holden to be charitable; as to establish a bridge or lifeboat for a town;<sup>1</sup> or “for purposes conducing to the good of the county of W., and the parish of L. especially;”<sup>2</sup> for supplying water to the town of C. for the use of the inhabitants;<sup>3</sup> for the improvement of the town of Bolton,<sup>4</sup> and of Bath;<sup>5</sup> for charitable, beneficial, and public works at Decca, in Bengal;<sup>6</sup> for the reduction of the national debt;<sup>7</sup> for erecting a town-house;<sup>8</sup> for planting and renewing shade trees in situations now exposed to the heat of the sun;<sup>9</sup> for the advantage and benefit of Great Britain;<sup>10</sup> for such purposes as the trustees may judge most for the benefit and ornament of the town.<sup>11</sup> Gifts to maintain a preaching minister; to build a sessions house; to rebuild St. Paul’s Church; or to pave, light, cleanse, and improve a town, — are charitable;<sup>12</sup> so are gifts to discharge a tax on the commonalty;<sup>13</sup> or for a botanical garden for the public benefit;<sup>14</sup> or for an institution for

4 T. R. 264; *Doe v. Copestake*, 6 East, 328; *Morice v. Durham*, 9 Ves. 399; 10 Ves. 522.

<sup>1</sup> *Johnston v. Swann*, 3 Madd. 457; *Forbes v. Forbes*, 23 Eng. L. & Eq. 335; *Hampden v. Rice*, 24 Conn. 350.

<sup>2</sup> *Att. Gen. v. Lonsdale*, 1 Sim. 105.

<sup>3</sup> *Jones v. Williams*, Amb. 651.

<sup>4</sup> *Att. Gen. v. Heelis*, 2 Sim. & St. 67.

<sup>5</sup> *Howse v. Chapman*, 4 Ves. 542.

<sup>6</sup> *Mitford v. Reynolds*, 1 Phil. 185.

<sup>7</sup> *Ashton v. Langdale*, 4 Eng. L. & Eq. 139; *Newland v. Att. Gen.*, 3 Mer. 684; *British Museum v. White*, 2 Sim. & St. 596.

<sup>8</sup> *Coggs v. Pelton*, 7 Johns. Ch. 292.

<sup>9</sup> *Cresson’s App.*, 30 Penn. St. 437.

<sup>10</sup> *Nightingale v. Goulbourn*, 5 Hare, 484; 2 Phil. 594.

<sup>11</sup> *Feversham v. Ryder*, 27 Eng. L. & Eq. 369.

<sup>12</sup> *Att. Gen. v. Heelis*, 2 S. & S. 67, 77; *Howse v. Chapman*, 4 Ves. 542; *Duke*, 109, 136; *Eltham Parish v. Warreyn*, *Duke*, 67; *Collinson’s Case*, Hob. 136.

<sup>13</sup> *Att. Gen. v. Bushby*, 24 Beav. 290.

<sup>14</sup> *Townley v. Bedwell*, 6 Ves. 194.

studying and curing the diseases of beasts and birds useful to man;<sup>1</sup> or to the British Museum for the collection and preservation of objects of science or art for the public improvement;<sup>2</sup> or to promote the public good by the encouragement of science and the useful arts;<sup>3</sup> or to purchase a fire-engine for a town;<sup>4</sup> or hose for a hose company;<sup>5</sup> or a gift to the Royal Geographical Society, or the Royal Humane Society;<sup>6</sup> or a grant of land for a pest-house for plague patients, though the plague had not appeared in England for one hundred and eighty years.<sup>7</sup>

§ 705. There are other and still more indefinite gifts, which have been held to be charitable within the letter and spirit of the statute; as gifts to benevolent and charitable purposes with a recommendation to apply them to domestic servants;<sup>8</sup> or "for charitable purposes, masses, (a) &c.,"<sup>9</sup> or for "such charitable purposes as the trustee shall think proper,"<sup>10</sup> or "if there is any money left I desire it to be given in charity;"<sup>11</sup> or "to such charitable purposes as I shall name hereafter" (and none are named);<sup>12</sup> or to public and private charities;<sup>13</sup> or to dispose of the same in such chari-

<sup>1</sup> University of London v. Yarrow, 23 Beav. 159; 1 De G. & J. 72.

<sup>2</sup> British Museum v. White, 2 S. & S. 594; Beaumont v. Oliveira, L. R. 6 Eq. 534; L. R. 4 Ch. 309.

<sup>3</sup> Gort v. Att. Gen., 6 Dow. 136; Att. Gen. v. Andrews, 3 Ves. 633; American Academy v. Harvard Coll., 12 Gray, 594.

<sup>4</sup> Magill v. Brown, Brightly, 411.

<sup>5</sup> Thomas v. Ellmaker, 1 Parsons, Eq. 98.

<sup>6</sup> Beaumont v. Oliveira, L. R. 6 Eq. 543; L. R. 4 Ch. 309.

<sup>7</sup> Att. Gen. v. Craven, 21 Beav. 392; Carne v. Long, 4 Jur. (n. s.) 474; 6 Jur. (n. s.) 639; 2 De G., F. & J. 75.

<sup>8</sup> Miller v. Rowan, 5 Cl. & Fin. 99.

<sup>9</sup> Schouler, Petitioner, 134 Mass. 426.

<sup>10</sup> White v. Ditson, 140 Mass. 351.

<sup>11</sup> Legge v. Asgill, Turn. & Russ. 265 n.

<sup>12</sup> Mills v. Farmer, 19 Ves. 489; 1 Mer. 55. Where the income was to be applied according to a statement appended, and there was no such statement, the court could not presume that the intent was charitable. Aston v. Wood, L. R. 6 Eq. 419.

<sup>13</sup> Johnston v. Swan, 3 Madd. 457.

(a) See *infra*, § 715, n.



table and benevolent purposes as one of the trustees shall direct;<sup>1</sup> or to be applied in aid of institutions for charitable and benevolent purposes, established or to be established in Edinburgh or vicinity;<sup>2</sup> or to be distributed in charity, either to private individuals or public institutions;<sup>3</sup> or for promoting charitable purposes as well of a public as a private nature;<sup>4</sup> or to such charitable purposes as V. shall appoint, V. dying in the testator's lifetime;<sup>5</sup> or "to the furtherance and promotion of the cause of piety and good morals; in aid of objects and purposes of benevolence or charity, public or private; to temperance, and for the education of deserving youth;"<sup>6</sup> or to religious and charitable institutions and purposes;<sup>7</sup> or to such charities as the executor shall deem most useful.<sup>8</sup> Gifts to be appropriated to the benefit of the Friends' Meeting are charitable;<sup>9</sup> or for the use of a lodge of Freemasons;<sup>10</sup> or to the American Peace Society, to be expended in the cause of peace;<sup>11</sup> or for the assistance of respectable Unitarian congregations;<sup>12</sup> or for the Universalist denomination;<sup>13</sup> or "for the preparation and circulation of books, newspapers, the delivery of speeches and lectures, and such other means as in the judgment of the trustees will create a public sentiment that will put an end to slavery in the United States;<sup>14</sup> or to assist fugitive slaves escaping

<sup>1</sup> *Jemmit v. Verrel*, Amb. 585, n.

<sup>2</sup> *Hill v. Burns*, 2 Wil. & Shaw, 80.

<sup>3</sup> *Horde v. Suffolk*, 2 My. & K. 59.

<sup>4</sup> *Waldo v. Caley*, 16 Ves. 206.

<sup>5</sup> *Moggridge v. Thackwell*, 7 Ves. 39.

<sup>6</sup> *Saltonstall v. Sanders*, 11 Allen, 454; *Dolan v. Macdermot*, L. R. 5 Eq. 60; *Treat's App.*, 30 Conn. 113.

<sup>7</sup> *Baker v. Sutton*, 1 Keen, 224.

<sup>8</sup> *Wells v. Doane*, 3 Gray, 201.

<sup>9</sup> *Earle v. Wood*, 8 Cush. 437; *Dexter v. Gardner*, 7 Allen, 245.

<sup>10</sup> *King v. Parker*, 9 Cush. 71; *Vander Volgen v. Yates*, 3 Barb. 242; *Duke v. Fuller*, 9 N. H. 536; *Everett v. Carr*, 59 Maine, 332; *Indianapolis v. Grand Master*, 25 Ind. 518. See *Babb v. Reed*, 5 Rawle, 151.

<sup>11</sup> *Tappan v. Deblois*, 45 Maine, 122.

<sup>12</sup> *Shrewsbury v. Hornbury*, 5 Hare, 406.

<sup>13</sup> *North Adams Univ. Soc. v. Fitch*, 8 Gray, 421.

<sup>14</sup> *Jackson v. Phillips*, 14 Allen, 558.

from the slave-holding States;"<sup>1</sup> or to such charities and other public purposes as lawfully might be in the parish of T.;<sup>2</sup> or for the increase and encouragement of good servants;<sup>3</sup> or for the maintenance of a Shaker community.<sup>4</sup> (a)

§ 706. It has been held, quite decidedly, that a trust to build a monument, tomb, or vault for the donor is not a charitable use;<sup>5</sup> in other cases, it has been held doubtful whether such trusts are charitable;<sup>6</sup> but it is now settled

<sup>1</sup> Ibid.

<sup>2</sup> *Dolan v. Macdermot*, L. R. 5 Eq. 60.

<sup>3</sup> *Loscombe v. Winteringham*, 13 Beav. 87; 7 Eng. L. & Eq. 164; *Reeve v. Att. Gen.*, 3 Hare, 191.

<sup>4</sup> *Gass v. Wilhite*, 2 Dana, 170.

<sup>5</sup> *Mellick v. Asylum*, Jacob, 180; *Doe v. Pitcher*, 6 Taunt. 359; *Hoare v. Osborne*, L. R. 1 Eq. 585; *Fisk v. Att. Gen.*, L. R. 4 Eq. 521; *Dawson v. Small*, L. R. 18 Eq. 114.

<sup>6</sup> *Matthews v. Masters*, 1 P. Wms. 422, 423, n.; *Durour v. Motteux*,

(a) Almost any definite gift useful to mankind or beneficial to the community will, it seems, be held a good charitable gift. *Com'rs v. Pemsel*, [1891] A. C. 531, 583; *Garrison v. Little*, 73 Ill. App. 402. This includes, *e. g.*, a gift to a society for the suppression of vivisection: *In re Foveaux*, [1895] 2 Ch. 501; for preventing cruelty to animals, or establishing a hospital for animals useful to man: see *Re Joy*, 60 L. T. 175; *In re Dean*, 41 Ch. D. 552; for a vegetarian society: *In re Cranston*, [1898] 1 Ir. R. 431; for erecting working-men's dwellings: *Webster v. Wiggin*, 19 R. I. 73; a gift to disabled soldiers and seamen: *Holmes v. Coates*, 159 Mass. 226; a testamentary gift for the benefit of a volunteer corps: *In re Lord Stratheden and Campbell*, [1894] 3 Ch. 265; for maintaining missions, at least when the

beneficiaries are certain: *Com'rs v. Pemsel*, [1891] A. C. 531; see *McAlister v. Burgess*, 161 Mass. 269; *Lane v. Eaton*, 69 Minn. 141; *Pack v. Shanklin*, 43 W. Va. 304; *Isbell's Estate*, 37 N. Y. S. 919; for the distribution of annual prizes to art or medical students: *Almy v. Jones*, 17 R. I. 265; *Palmer v. Union Bank*, id. 627; for disseminating the doctrines of Henry George: *George v. Brad-dock*, 45 N. J. Eq. 757; see 30 Cent. L. J. 334; 22 Am. L. Rev. 620; 24 id. 489; for a public park: *Bartlett, Petitioner*, 163 Mass. 509; *Meeker v. Puyallup*, 5 Wash. St. 759; but not a gift for prizes in mere sports, such as yacht racing: *In re Nottage*, [1895] 2 Ch. 649; or a public enterprise, such as the World's Fair, when a local corporation. *World's Columbian Exposition v. United States*, 56 F. R. 630, 654. See 38 Albany L. J. 369.

that a trust to build, maintain, and keep in repair tombs, vaults, and burying-grounds of the donors, their families or parishes, are so far charitable that they will be carried into effect.<sup>1</sup>(a) A bequest of an annual sum for repairs upon a monument has been held good.<sup>2</sup> Such bequests will always be enforced as against the heir.<sup>3</sup>

§ 707. In all these cases it is immaterial from what source the funds that constitute the trust are derived, whether from the bounty of individuals, the crown, the State, or legislature. If a trust is contemplated and endowed with funds from any source, for a general public purpose, it will be regulated and controlled by a court of equity, upon proceedings instituted before it.<sup>4</sup> But if the legislature, by general or special laws, establishes schools, hospitals, roads, harbors, and other public improvements, and appropriates the money therefor, and directs by a public law how such money shall be raised and expended, such works are not charities within the meaning of the law, and courts of equity have no jurisdiction to regulate and control them.<sup>5</sup>

1 Ves. 320; *Willis v. Brown*, 2 Jur. 987; *Mitford v. Reynolds*, 1 Phil. 185, 198; *Cole v. Adams*, 6 Beav. 353; *Doe v. Pitcher*, 3 M. & S. 410.

<sup>1</sup> *Lloyd v. Lloyd*, 10 Eng. L. & Eq. 139; 2 Sim. (N. S.) 255; *Dexter v. Gardner*, 7 Allen, 247; *Swasey v. American Bible Soc.*, 57 Maine, 527. See *contra*, as to repairs of private tombs, etc., 134 Mass. 100; 33 Ch. D. 187; 72 Me. 155; 12 Heisk. 635; 12 Lea, 328.

<sup>2</sup> *Willis v. Brown*, 2 Jur. 987.

<sup>3</sup> *Gravenor v. Hallum*, Amb. 643.

<sup>4</sup> *Thomas v. Ellmaker*, 1 Par. Eq. Ca. 98; *Att. Gen. v. Shrewsbury*, 6 Beav. 220; *Att. Gen. v. Eastlake*, 11 Hare, 205; *Att. Gen. v. Heelis*, 2 S. & S. 76; *Att. Gen. v. Brown*, 1 Swanst. 297; *Hullman v. Honcomp*, 5 Ohio St. 237.

<sup>5</sup> *Att. Gen. v. Heelis*, 2 S. & S. 77.

(a) A gift for a public burial-ground, or one in connection with a church: *Hopkins v. Grimshaw*, 165 U. S. 342, 352; or of land to a church for the keeping and care of a family lot in a cemetery, is charitable. *St. 263; Bronson v. Strouse*, 57 Conn. 147; see *Kelly v. Nichols*, 18 R. I. 62; *Ford v. Ford* (Ky.), 16 S. W. 451. But not a gift for a monument outside of a church or church yard. See 35 Am. L. Reg. *Nauman v. Weidman*, 182 Penn. N. S. 469.

§ 708. The cases thus far enumerated as good charitable uses serve to indicate what trusts come within the letter or equity of the statute. It does not follow, however, that American courts can enforce all bequests which may be called charities. The purpose of the gift may be charitable beyond a question; but the court, in the ordinary exercise of its judicial powers, may be unable to establish and administer it. For example, if a testator bequeaths a sum of money in trust for such charitable purpose as he shall name thereafter, and dies without naming the purpose,<sup>1</sup> it is plain that the testator had a charitable intent; but to establish and administer such a charity requires a power and jurisdiction that American courts do not possess; to wit, the power of completing the testator's will, and of naming the purposes to which the bequest shall be applied. This is a prerogative power which belongs to the sovereign power in the State, and courts of equity do not possess it, unless it is conferred upon them by statute. The same remarks apply to many of the cases hereafter enumerated, which were disallowed and set aside as charitable trusts. Many of the gifts were charitable within all the principles of the statute; but there was some indefiniteness in the application of the fund to the objects named, which the courts decided they had not the rightful power to control.

§ 709. Before proceeding to notice and enumerate the cases in which trusts have been held not to be charitable within the letter and equity of the statute, or which for other reasons have been set aside and disallowed, it is proper again to observe that courts look with favor upon all such donations, and endeavor to carry them into effect, if it can be done consistently with the rules of law. (a) If the words of

<sup>1</sup> *Mills v. Farmer*, 19 Ves. 482; 1 Mer. 55.

(a) Equity favors charities, holds them valid when possible, and does not encourage the defence of laches in suits relating to their administration. *Duggan v. Slocum*, 83 F. R. 244; 92 id. 806; *Ingraham v. Ingraham*, 169 Ill. 432; *Willey's Estate* (Cal.), 56 Pac. 550. In

a gift are ambiguous or contradictory, they are so construed as to support the charity if possible. It is an established maxim of interpretation, that the court is bound to carry the gift into effect, if it can see a general charitable intention consistent with the rules of law, even if the particular manner indicated by the donor is illegal or impracticable;<sup>1</sup> or, as Lord Hardwicke said, "The bequest is not void, and there is no authority to construe it to be void, if by law it can possibly be made good;" or, in other words, "there is no authority to construe it to be void by law if it can possibly be made good."<sup>2</sup> But no forced construction will be adopted to uphold the gift.<sup>3</sup> If the fair meaning of the words may include a legal as well as an illegal application, the gift will be upheld, and restrained within the bounds of law; or if a word is used which has two meanings, one of which will effect, and the other defeat, the purpose of the gift, the former will be adopted.<sup>4</sup> From the foregoing cases and principles, it will be seen that courts of chancery uphold and administer gifts where they are made to particular purposes which are charitable within the letter and spirit of the statute, or where they are made to charity generally, if there is a trustee with power to make them definite and certain. It will further be seen that the word "charity" has obtained a signification in law; and that courts do not

<sup>1</sup> *Williams v. Williams*, 4 Selden, 525; *Martin v. Margham*, 14 Sim. 230; *Jackson v. Phillips*, 14 Allen, 556; *Bartlett v. King*, 12 Mass. 543; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 117, 118.

<sup>2</sup> *Soresby v. Hollins*, 9 Mod. 221; *Amb. 211*; 1 Coll. Jurid. 439; *Att. Gen. v. Whitechurch*, 3 Ves. Jr. 144; *Curtis v. Hutton*, 14 Ves. 539; *Dent v. Allcroft*, 30 Beav. 340; *Feversham v. Ryder*, 5 De G., M. & G. 353; *Edwards v. Hall*, 11 Hare, 12; 6 De G., M. & G. 89; *Philpot v. St. George Hospital*, 6 H. L. Cas. 338.

<sup>3</sup> *Att. Gen. v. Williams*, 2 Cox, 388; *Tatham v. Drummond*, 11 L. T. (N. S.) 325; 10 Jur. (N. S.) 1087.

<sup>4</sup> *Whicker v. Hume*, 14 Beav. 509; 1 De G., M. & G. 506; 7 H. L. Cas. 124; *Saltonstall v. Sanders*, 11 Allen, 455; *Jackson v. Phillips*, 14 Allen, 557; *Bruce v. Presbytery of Deer*, L. R. 1 H. L. Scot. 96.

general laches is not a defence to Ibid.; *Independence Church v. Re-organized Church*, 71 F. R. 250.

uphold or administer trusts for particular purposes which are not charitable within the meaning of the law, nor trusts expressed in general words which do not come within the legal signification of the word "charity." (a)

§ 710. In order that there may be good trust for a charitable use, there must always be some public benefit open to an indefinite and vague number; that is, the persons to be benefited must be vague, uncertain, and indefinite, until they are selected or appointed to be the particular beneficiaries of the trust for the time being.<sup>1</sup> Consequently a trust to establish a school which is not free, but the benefits of which are confined to particular individuals who are named in the will, is not a charitable trust, and will not be regulated by the court.<sup>2</sup> A common fund created by voluntary subscriptions or contributions, the benefits being restricted to the members of the association, is not a charitable fund, controllable by a court of equity.<sup>3</sup> A trust for forming a museum in connection with the trustees of Shakespeare's house in Stratford, and for such other purposes as the executors should think fit,<sup>4</sup> is not charitable, because the benefit is confined to particular individuals, and also because the executor has the power to apply the funds to "other purposes," which may be anything but charitable. A trust for the political restoration of the Jews to Jerusalem is not charitable in its nature;<sup>5</sup> and so a gift to secure the passage of laws granting women the right to vote and hold office, and the rights of men generally, has nothing of the idea of charity in it.<sup>6</sup> In the

<sup>1</sup> *Burke v. Roper*, 79 Ala. 142. See *Holland v. Alcock*, 108 N. Y. 312, 330.

<sup>2</sup> *Blandford v. Fackerell*, 4 Bro. Ch. 394; *Att. Gen. v. Hewer*, 2 Vern. 387. A school of art was said not to be charitable. *Duke*, 128.

<sup>3</sup> *Burke v. Roper*, 79 Ala. 142.

<sup>4</sup> *Thompson v. Shakespeare*, 1 John. 612; 6 Jur. (N. S.) 118, 281; 1 De G., F. & J. 399.

<sup>5</sup> *Habershon v. Vardon*, 7 Eng. L. & Eq. 228; 4 De G. & Sm. 467.

<sup>6</sup> *Jackson v. Phillips*, 14 Allen, 571. See *Bacon v. Ransom*, 139 Mass. 119.

(a) See 28 Am. L. Reg. N. S. 185.

case from Allen the bequest of Jackson to secure a change in the laws, not being a charity, was void under the rule against perpetuities, but in the later case the daughter of Jackson practically accomplished his purpose by giving the property *absolutely* to S. & A., with a request that they would use the fund to further the "Woman's Rights Cause," adding, "But neither of them is under any legal responsibility to any one or to any court to do so." This was upheld, not as a trust, but as an absolute gift. Money contributed by the members of a club to a common fund, to be applied to the relief and assistance of the particular members of the club when in sickness, want of employment, or other disability, is not a charitable fund to be controlled by a court of equity.<sup>1</sup> (a) There is a distinction between a fund contributed by members of a club, society, association, or lodge, to be employed and disposed of among themselves as the members may at any time agree, and a gift conferred, as matter of bounty, upon such club, society, or lodge, in trust to be distributed in charity. In the latter case it is a charitable use,<sup>2</sup> and cannot be divided among the members in disregard of the purposes for which the funds were contributed.<sup>3</sup> A bequest to a corporation to enable it to keep a larger supply of corn in London for the market is not charitable;<sup>4</sup> and a devise to a corporation to distribute the rents among twenty-four persons named, as they may need assistance, is not charitable; but it gives a vested right to each of the *cestuis que trust* to seek redress in equity.<sup>5</sup> A gift for "the support of those of

<sup>1</sup> *Babb v. Reed*, 5 Rawle, 151; *Att. Gen. v. Federal St. Meeting-house*, 3 Gray, 44; *Anon.*, 3 Atk. 277; *Brenon's Estate*, Brightly, 345.

<sup>2</sup> *Duke v. Fuller*, 9 N. H. 538; *Vander Volgen v. Yates*, 3 Barb. Ch. 290; *Thomas v. Ellmaker*, 1 Par. Eq. 108; *Penfield v. Sumner*, 11 Vt. 226; *Wright v. Lynn*, 9 Penn. St. 433; *Indianapolis v. Grand Master*, 25 Ind. 518.

<sup>3</sup> *Potts v. Philadelphia Association*, 1 (Pa.) Leg. Gaz. R. 369.

<sup>4</sup> *Att. Gen. v. Haberdashers' Co.*, 1 My. & K. 420.

<sup>5</sup> *Liley v. Hey*, 1 Hare, 580; *Philadelphia v. Fox*, 64 Penn. St. 176.

(a) A hospital supported by a the latter, is a charitable institution. *Union Pac. Ry. Co. v. Artist, ployees*, for the free treatment of 60 F. R. 365.

my children and their descendants who may be destitute," is not a charity.<sup>1</sup>

§ 711. There are other cases where legacies are given in trust for purposes that are clearly charitable; but these purposes are joined with words that authorize the trustees to expend the fund for general purposes which are not charitable. If the fund is not apportioned by the donor, the trustees may expend the whole for one purpose or another which is not charitable, and at the same time execute the exact power given them under the will. In such cases courts cannot establish and administer the fund as charitable. For example, a gift for such charitable and *other purposes* as the executors might think fit cannot be sustained as charitable; for the executors have power by the will to apply the whole to purposes *other* than charitable.<sup>2</sup> So a gift to executors in trust to dispose of it at their pleasure, either for charitable or public purposes, or to any person or persons in such shares as they should think fit, was not sustained for the same reason.<sup>3</sup> So gifts in trust for such uses as the trustees see fit,<sup>4</sup> or to such persons as the trustees think fit,<sup>5</sup> have no element of charity in them that courts can administer. A gift in trust for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging works of general utility,<sup>6</sup> was not sustained. So a trust for benevolent purposes was not sustained, as benevolence may or may not be charitable in the law.<sup>7</sup> For the same reason where a bequest was made to the Bishop of Durham, in trust for such objects of benevolence and liberality as he should approve,

<sup>1</sup> Kent v. Dunham, 142 Mass. 216.

<sup>2</sup> Ellis v. Selby, 1 M. & Cr. 286, 299; 7 Sim. 352; Chamberlain v. Stearns, 111 Mass. 267.

<sup>3</sup> Vezey v. Jamson, 1 S. & S. 69; Harris v. Du Pasquier, 23 L. T. (N. s.) 689; Chamberlain v. Stearns, 111 Mass. 267; Nichols v. Allen, 130 Mass. 211.

<sup>4</sup> Fowler v. Garlike, 1 Russ. & My. 232; Nash v. Morley, 5 Beav. 182.

<sup>5</sup> Gibbs v. Ramsey, 2 Ves. & B. 295.

<sup>6</sup> Kendall v. Granger, 5 Beav. 300.

<sup>7</sup> James v. Allen, 3 Mer. 17; Norris v. Thompson, 19 N. J. Eq. 311.



the court held that the fund could not be administered as a charity, and ordered it to be paid over to the next of kin.<sup>1</sup> These cases all proceed upon the maxim, that a trust to be valid must be under the control of a court, and the trust must be of such a nature that its administration can be reviewed. A trust for charity must therefore be governed by some principles that are familiar to the court. These principles have grown up in relation to the words "charity" and a "charitable use," and to descriptions that come within them; but there are no rules that can be applied to mere benevolence, liberality, or generosity, or to any words that give a discretion and power to the trustees to apply the funds to any purposes within the whole range of human action.

§ 712. In addition to the above cases, which proceed upon clear and intelligible principles, are two cases which have given rise to much criticism and discussion. *Ommanney v. Butcher*<sup>2</sup> decided that a trust for "private charity" could not be administered in a court of equity. *Williams v. Kershaw*<sup>3</sup> determined that a trust for "benevolent, charitable, and religious purposes" was not a good charitable use within the letter or spirit of the statute. The objection to the first case is, that "private charity" refers to private almsgiving, or private relief of the poor; that the objects of such charity are uncertain and indefinite until selected by the trustees; that the distribution of alms and relief to the poor in such manner is no more personal than the relief of the individual poor must always be; that the trustees can be required to account for the distribution of the funds, and that they can be dealt with by the court for any bad faith or breach of the trust; in short, that such a gift has all the elements of a good charitable use. The principal objection to the other decision is, that the word "benevolent," in the connection in which it was used, signified "charitable;" that, upon the

<sup>1</sup> *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 522.

<sup>2</sup> *Ommanney v. Butcher*, 1 Turn. & Russ. 260.

<sup>3</sup> *Williams v. Kershaw*, 5 Law Jur. (N. S.) Ch. 84, cited 1 Keen, 232; 1 My. & Cr. 293.

most approved rules of interpretation applied to charitable bequests, the word should have had its meaning fixed by the context; and that, taking all together, a good charitable use was intended, and not a general, liberal, or benevolent use. Mr. Boyle examines and criticises these cases at great length, and concludes that they are not true expositions of the law.<sup>1</sup> In Massachusetts, a bequest was made in trust "in aid of objects and purposes of benevolence or charity, public or private." Mr. Justice Gray examined these cases with great care, and arrived at the conclusion that they were at least of doubtful authority in England, and that they certainly would not be followed in Massachusetts.<sup>2</sup> In

<sup>1</sup> Boyle on Charities, pp. 286-299.

<sup>2</sup> *Saltonstall v. Sanders*, 11 Allen, 462. In this case, Mr. Justice Gray says: "The decision which goes furthest to support the position of the plaintiffs as to the meaning of the words 'private charity' is that of *Ommanney v. Butcher*, Turn. & Russ. 260. There a testator, after legacies to certain individuals, and to various schools, hospitals, and other religious and charitable institutions of which he was a governor or trustee, added, 'In case there is any money remaining, I should wish it to be given in private charity.' Sir Thomas Plumer, M. R., held this last bequest too indefinite to be carried out, either by the sign-manual of the crown, or by the ordinary jurisdiction in chancery. The opinion does not show that degree of thought and research which characterizes most of the judgments of that learned person. His statement that there was no case in which private charity had been acted upon by the court is inconsistent with the long line of authorities above quoted, not one of which is noticed in the opinion, except *Legge v. Asgill*; and no attempt is made to distinguish that case, although the direction there that any money left unemployed might 'be given in charity,' as Mr. Boyle remarks, in his able and discriminating treatise, 'surely must be regarded as pointing quite as much, if not more, to private than to public charity.' Boyle on Charities, 300. Sir Thomas Plumer's expression, that 'the charities recognized by this court are public in their nature, they are such as the court can see to the execution of,' suggests the inference that he thought it necessary to have the funds distributed openly in the public view, or the court could not supervise the distribution. This inference is confirmed by his adding, 'assisting individuals in distress is private charity; but how can such a charity be executed by the court?' To which it may be answered, 'By requiring an account, as of any other trustee who is charged with neglect or breach of trust.' And the cases already cited show that Lord Hardwicke, Lord Eldon, Sir William Grant, and Sir John Leach upheld and

New Jersey, a gift in trust to be distributed "to benevolent, religious, and charitable institutions," at the discretion of

executed charities for privately assisting indefinite numbers of individuals in distress. Sir Thomas Plumer says, 'In all cases the general principle is, that the trust must be of such a tangible nature as that the court can deal with it; when it is mixed up with general moral duty, it is not the subject of the jurisdiction of a court of justice.' But general moral duty, carried out in acts beneficial to an indefinite number or class of persons, is of the very essence of a charity: and, in the cases in which trusts have been set aside as too vague, it has been upon the ground that they might be applied to the benefit of particular individuals, to benefit whom was of no general or public advantage. If, as he says, 'private charity is in its nature indefinite,' it has the principal requisite of a public charity. This judgment of Sir Thomas Plumer, although countenanced by *obiter dicta* of Lord Cottenham near the beginning of his career as chancellor, in *Williams v. Kershaw*, 5 Law Jour. (N. S.) Ch. 86, and *Ellis v. Selby*, 1 Myl. & Cr. 293, cannot, in a court not bound by it as a precedent, outweigh all the other authorities.

"There is a species of organization, sometimes called a 'private charity,' which is not a public or general charity in the view of the Stat. of Eliz., or of a court of chancery; and that is an association for the mutual benefit of the contributors, and of no other persons. But such a case wants the essential element of indefiniteness in the immediate objects, if not that of gratuity in the contribution. *Anon.*, 3 Atk. 277; *Att. Gen. v. Haberdashers' Co.*, 1 Myl. & K. 420; *Carne v. Long*, 2 De G., F. & J. 75; *Att. Gen. v. Federal St. Meeting-house*, 3 Gray, 44-52. Upon no reasonable construction can a bequest to 'private charity,' still less one to 'charity public or private,' be brought within that class.

"The decisions of Lord Langdale, to which the plaintiffs have referred, were as follows: In one of them he held a bequest to executors to receive the interest half-yearly, 'and divide it among poor pious persons, male or female, old or infirm, as they see fit, not omitting large and sick families, if of good character,' to be a valid charitable bequest for the poor. *Nash v. Morley*, 5 Beav. 177. In the other, of a bequest to trustees to be applied at their discretion, 'for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility,' Lord Langdale said that if the sentence had ended with the word 'individuals' it would have been a good charitable purpose; but he felt himself bound by the decisions to hold that the words 'general utility' (which do not occur in the will before us) were large enough to include purposes which were not charitable, and that the whole bequest was therefore void. *Kendall v. Granger*, 5 Beav. 300.

"In *Ellis v. Selby*, 7 Sim. 352; s. c. 1 Myl. & Cr. 286, the only point decided was, that a bequest in trust for 'charitable or other purposes,' as

the wife of the testator, was declared not to be a good charitable use, and that the word "benevolent," in the colloca-

the trustee should think fit, was void. The correctness of that decision cannot be doubted; for the testator could hardly have expressed more clearly an intention to allow the fund to be applied to purposes which were not charitable, as well as to those which were. The decision of Sir John Leach, in *Vezey v. Jamson*, 1 Sim. & Stu. 69, against the validity of a gift in trust for 'such charitable or public purposes as the laws of the land would admit of, or to any person or persons,' and in such shares and manner as the trustees should think fit or as the laws admitted of, is to the same effect; and manifests no intention to overrule or qualify the cases in which he had upheld trusts for 'public or private charities,' or 'to be distributed in charity to private individuals or public institutions,' or for 'charitable and benevolent purposes.' *Johnston v. Swann*, and *Horde v. Earl of Suffolk*, *ut supra*; *Jemmit v. Verril*, *infra*, and the passages quoted from Lord Lyndhurst's opinion in *Mitford v. Reynolds*, 1 Phil. 190, and from Tudor on Charitable Trusts (2d ed.), 223, go no further. Within the same class falls the decision of Vice-Chancellor Knight Bruce, that a direction that part of the testator's property should 'be given in occasional sums to deserving literary men, or to meet expenses connected with my manuscript works,' part of the profits of which works he gave to members of his family, was void. *Thompson v. Thompson*, 1 Colly. R. 388, 392, 399. Others of the cases cited for the plaintiffs related to bequests in trust to be disposed of in the trustees' discretion, without any mention whatever of charities in the will. Such were *Fowler v. Garlike*, 1 Russ. & Myl. 282, and *Stubbs v. Sargon*, 2 Keen, 255; s. c. 3 Myl. & Cr. 507.

"We are therefore of opinion, that, upon principle and authority, a bequest for 'objects and purposes of charity, public or private,' is a valid charitable gift. The effect of the use of the word 'benevolence' in connection with the word 'charity' remains to be considered.

"The earliest case cited for the plaintiffs upon this point is that in which Sir William Grant and Lord Eldon, on appeal, held that a bequest to the Bishop of Durham in trust, to be applied 'to such objects of benevolence and liberality as the Bishop of Durham, in his own discretion, should most approve of,' was too indefinite to be executed. *Morice v. Bishop of Durham*, 9 Ves. 399; s. c. 10 Ves. 521. But 'liberality' might include gifts to persons who were neither poor nor deserving, and in no sense legal or moral objects of charity. The word 'charity' was not used; and its absence was much relied on, Sir William Grant saying, 'The use of the word "charitable" seems to have been purposely avoided in this will, in order to leave the bishop the most unrestrained discretion.' 9 Ves. 404, 405; 10 Ves. 541. Sir William Grant afterwards held, that a bequest to trustees 'to be by them applied and disposed of for and to such benevolent purposes as they in their integrity and discretion may unani-

tion in which it was found in that will, did not mean "charitable."<sup>1</sup> The word "benevolent" has often been con-

mously agree on,' fell within the same class. *James v. Allen*, 3 Mer. 17. But in that case again, the word 'charity' was not used. Lord Brougham subsequently defined the distinction upon which those cases turned, thus: 'If the intention be charity, the court will execute it, however vaguely the donor may have indicated his purpose. But mere purposes of a kind generally beneficial, as of those of benevolence or liberality, without specifying the objects who are to receive, and those objects not being the poor, the court will never attempt to execute.' *Att. Gen. v. Haberdashers' Co.*, 1 Myl. & K. 428.

"Vice-Chancellor Leach used 'general benevolence' as equivalent to charity. He held a bequest 'to the widows and orphans of the parish of Lindfield' to be a charitable gift to the poor widows and orphans of that parish, because it 'could not in its nature have proceeded from motives of personal bounty to particular individuals; it must have proceeded from general benevolence towards two classes of persons who were suffering under a common circumstance of destitution or privation, and is necessarily to be confined to such of those two classes who are within the scope of general benevolence.' *Att. Gen. v. Comber*, 2 Sim. & Stu. 93. And he upheld a bequest to trustees to be applied and disposed of 'for such charitable and benevolent purposes' as one of them should direct and think proper. *Jemmit v. Verril*, Amb. 585, note.

"By far the strongest case in favor of the plaintiffs is that of *Williams v. Kershaw*, which is not to be found in any of the regular reports, but is reported by Mr. Beavan in 5 Law Jour. (N. S.) Ch. 84, and an abstract of it printed in 5 Clark & Fin. 111. In that case, a testator, after legacies for education, the poor, missionary societies, and dissenting ministers, gave the residue of his personal estate to trustees, to apply the income 'to and for such benevolent, charitable, and religious purposes as they in their discretion shall think most advantageous and beneficial.' Sir Christopher C. Pepys, M. R., considered himself bound by the case of *Morice v. Bishop of Durham*, *James v. Allen*, and *Ommanney v. Butcher*, to hold that this would authorize the application of the income to benevolent purposes which were neither charitable nor religious, and was therefore void; and two months afterwards, having meanwhile become Lord Chancellor Cottonham, he referred to the decision with approval. *Ellis v. Selby*, 1 Myl. & Cr. 298.

"But that decision is directly opposed to the construction given to like words in earlier and later judgments of the House of Lords upon appeals from the courts of Scotland. In *Hill v. Burns*, 2 Wils. & Shaw, 80, a bequest was held valid by which a testatrix appointed the residue of her

<sup>1</sup> *Norris v. Thompson*, 19 N. J. Eq. 308.

strued by the court to mean the same thing as "charitable" in the law, and trusts for benevolent or charitable purposes have been carried into effect.<sup>1</sup> In Massachusetts, the word "benevolence" has been so often used in the constitution of the State, and in so many general and private statutes, as equivalent to, and synonymous with, the word "charity," that it has come to have that meaning in the law.<sup>2</sup> (a)

estate 'to be applied by my said trustees in aid of the institutions for charitable and benevolent purposes, established or to be established in the city of Glasgow or neighborhood thereof; and that in such way and manner, and in such proportions of the principal or capital, or of the interest or annual proceeds of the sums so to be appropriated, as to my said trustees shall seem proper; declaring, as I hereby expressly provide and declare, that they shall be the judges of the appropriation of the said residue for the purposes aforesaid.' That case was cited as authority by Lord Lyndhurst in *Crichton v. Grierson*, 3 Bligh, N. R. 434; s. c. 3 Wils. & Shaw, 341. In a later case, in which *Williams v. Kershaw* was cited, the House of Lords established a residuary bequest to trustees to be applied 'to such benevolent and charitable purposes as they think proper,' recommending them, if it should amount to £600, to hold the principal, and pay out the income annually 'to faithful domestic servants, settled in Glasgow or the neighborhood, who can produce testimonials of good character and morals from their masters and mistresses after ten years' service;' but if less than that amount, the testator authorized his trustees 'to distribute the same to such charitable or benevolent purposes as they may think proper.' *Miller v. Rowan*, 5 Cl. & Fin. 99; s. c. 2 Shaw & Macl. 866.

"It was indeed said, in the two cases last cited, that the law of England as to charitable bequests was more strict than the law of Scotland. But the decision of the English courts since our revolution are of no binding authority in this court; and, upon such a question as the interpretation of the word 'benevolence,' as connected with 'charity,' of no peculiar weight, when opposed to the well-settled meaning of those words in our own law."

<sup>1</sup> *Miller v. Rowan*, 5 Cl. & Fin. 99; *Jemmit v. Verril*, Amb. 585, n.; *Hill v. Burns*, 2 Wils. & Shaw, 80; *Saltonstall v. Sanders*, 11 Allen, 465; *Johnston v. Swann*, 3 Madd. 457; *Goodale v. Mooney*, 60 N. H. 535, where a bequest for relatives and "benevolent" purposes, in such sums as the trustees should deem best, was upheld.

<sup>2</sup> *Saltonstall v. Sanders*, 11 Allen, 468, 470.

(a) In England a gift for charitable purposes is *re Macduff*, [1896] 2 Ch. 451. In Massachusetts and Maine, it is held not a good charitable bequest. In that the word "benevolent" may

§ 713. There is another class of trusts for charities that courts decline to sustain and administer, on the ground that they are *too* general, vague, and indefinite to be applied to any certain charitable use. This class is larger in America than in England, as the Lord Chancellor in the English chancery can exercise the prerogative of the crown in administering an indefinite trust; but American courts can exercise only the ordinary judicial powers of courts of equity. Even in England, Lord Chancellor Thurlow declined to sustain a trust to buy and distribute such books as might have a tendency to promote the interest of virtue and religion and the happiness of mankind.<sup>1</sup> Where a testator directed his executors to pay over certain property for the benefit of the Methodist Episcopal Church in America, to be disposed of by the conference, or the different members composing

<sup>1</sup> *Brown v. Yeall*, 7 Ves. 50, n., 76; 9 Ves. 406; 10 Ves. 27, cited. Perhaps the most remarkably comprehensive will of this kind on record is the will of one of the Norton family (Southwick) in 1484, reported in "Curiosities of the Search Room," p. 206, by which the testator undertook to give all he had "to be used unto the end of the world for the benefit of the poor, the hungry, the thirsty, the naked, the sick, and the wounded, and prisoners," and appointed the Houses of Parliament his executors; unfortunately not available as an authority, the testator having been declared insane.

include purposes which may be deemed charitable by a court of equity, and it may also include "acts dictated by kindness, good will, or a disposition to do good, the objects of which have no relation to the promotion of education, learning, or religion, the relief of the needy, the sick, or the afflicted, the support of public works, or the relief of public burdens, and cannot be deemed charitable in the technical and legal sense." *Chamberlain v. Stearns*, 111 Mass. 267; *Massachusetts Society for the Prevention of Cruelty to Animals v. Boston*, 142 Mass. 24; *Murdock v. Bridges*,

91 Maine, 124. The word "charitable" refers to hospitals and other charitable institutions for the relief of the poor or the sick. The reason of their exemption from taxation is that they render a service to the public by relieving the State or municipality from expense. See *Cooley on Taxation* (2d ed.), 202; *New England Theosophical Corporation v. Boston*, 172 Mass. 60, 62; *People v. Powers*, 147 N. Y. 104; *Hull v. Pearson*, 55 N. Y. S. 324; *Livesey v. Jones*, 55 N. J. Eq. 204; 35 Atl. 1064; 41 id. 1115; *Stuart v. Easton*, 74 F. R. 854.

the same, as they, in their godly wisdom, shall judge will be most expedient or beneficial for the increase or prosperity of the gospel, it was held that the bequest was void for uncertainty.<sup>1</sup> A devise to the annual conference of the Methodist Episcopal Church for the benefit of institutions of learning under the superintendence of said conference, and the missionary society of said church, and to be otherwise disposed of as the Tennessee annual conference may deem best in their wisdom, was held void; and an act of the legislature appointing trustees to receive the fund was held unconstitutional and void.<sup>2</sup> A bequest to be applied to home or foreign missions and poor saints was held void;<sup>3</sup> and so a direction to the trustees to expend any surplus income for the support of indigent pious young men preparing for the ministry in New Haven was held void.<sup>4</sup> A bequest to be expended in the education of colored children, both male and female, in such manner as may be deemed best, the object being to promote the moral and religious improvement of the colored race, was held to be too indefinite, and therefore void, there being no trustees with the power of selecting the objects of the charity.<sup>5</sup> If there were trustees in these cases ready and willing to receive the funds, and to execute the powers conferred by the testaments, and to select the objects of the trust and thus make them certain, and apply the funds to such objects, it is difficult to see why the courts could not have carried these trusts into effect without invoking any extraordinary powers. A bequest to "a Catholic church" to secure prayers for souls in purgatory was held too vague.<sup>6</sup> A bequest "for charitable purposes" is too indefinite.<sup>7</sup>

§ 714. If the sum to be given to a charitable use be left blank or uncertain, the trust will fail; as where £6,000 was

<sup>1</sup> *Holland v. Peck*, 2 Ired. Ch. 255.

<sup>2</sup> *Green v. Allen*, 5 Humph. 170.

<sup>3</sup> *Bridges v. Pleasants*, 4 Ired. Ch. 26.

<sup>4</sup> *White v. Fisk*, 22 Conn. 31.

<sup>5</sup> *Grimes v. Harmond*, 35 Ind. 198.

<sup>6</sup> *Holland v. Alcock*, 108 N. Y. 312.

<sup>7</sup> *Webster v. Morris*, 66 Wis. 366.



given for a hospital, to increase till it amounted to — for supporting — boys,<sup>1</sup> it was held to have failed. So if the original sum to be given is not specified;<sup>2</sup> and if a gross sum is given for charitable uses, and for other purposes which fail for illegality or indefiniteness, or for want of certainty in the sum to be applied to the charity,<sup>3</sup> the trust will fail. But where a sum certain was given to a testator's relations, and to a charity, but the proportions were not named, the court applied the maxim that *equality is equity*, and divided the fund equally between the family and the charity.<sup>4</sup> Mr. Boyle contends, that, as the words in *Williams v. Kershaw*<sup>5</sup> were "for benevolent, charitable, and religious purposes," the fund should have been divided into three parts, as two of the purposes were good at any rate, even if "benevolent" did not mean "charitable," and two parts of the fund should have been applied to the valid objects, and the other part returned to the next of kin.<sup>6</sup> Where a bequest of £1,000 was made to the Jews' poor, Mile End, and there were two charitable institutions for Jews at that place, as it was uncertain to which the bequest was intended, the court divided it equally.<sup>7</sup> Where a testator bequeathed a fund to trustees for erecting such monument to his memory as they saw fit, and in building an organ gallery to the

<sup>1</sup> *Ewen v. Bannerman*, 2 Dow. & Cl. 74.

<sup>2</sup> *Flint v. Warren*, 15 Sim. 626; *Second Cong. Soc. v. First Cong. Soc.*, 14 N. H. 315; *Russell v. Jackson*, 10 Hare, 204; *Coxe v. Bassett*, 3 Ves. 155; *Hartshorne v. Nichols*, 26 Beav. 58.

<sup>3</sup> 1 Jarman on Wills, pp. 195, 196 (ed. 1861).

<sup>4</sup> *Att. Gen. v. Doyley*, 2 Eq. Ca. Ab. 194; 4 Vin. 485; 7 Ves. 58, n.; *Moggridge v. Thackwell*, 3 Bro. Ch. 517; 1 Ves. Jr. 464; 7 Ves. 38; *Mills v. Farmer*, 1 Mer. 55; 19 Ves. 483; *Att. Gen. v. Bradley*, 1 Eden, 482; *Saulsbury v. Denton*, 3 K. & J. 529; *Longman v. Broom*, 7 Ves. 124; *Penny v. Turner*, 2 Phil. 493; *Tothill*, 92, 95, 96.

<sup>5</sup> 5 L. Jour. (N. S.) Ch. 84; 5 Cl. & Fin. 111.

<sup>6</sup> *Boyle on Charities*, pp. 290-293; *Hoare v. Osborne*, L. R. 1 Eq. 585.

<sup>7</sup> *Bennett v. Hayter*, 2 Beav. 81; *Waller v. Child*, Amb. 524; *Bishop Gore's Charity*, 4 Dr. & War. 270; *Simon v. Barker*, 5 Russ. 112; *Pieschel v. Paris*, 2 S. & S. 384; *Saulsbury v. Denton*, 3 K. & J. 529; *In re Atchin's Trusts*, L. R. 14 Eq. 232; *In re Kilvert's Trusts*, L. R. 7 Ch. 170; *Bradshaw v. Thompson*, 2 Y. & C. Ch. 295.

church, and the trustees expended the whole sum upon the monument, the court held it to be a breach of the trust.<sup>1</sup> In all these cases the intention of the testator, to be gathered from the whole will, should guide in the administration of the fund.<sup>2</sup> Where a testator devised a sum to the school society of the town of S., and directed that the society should annually appoint trustees to hold the fund, and there were two societies of the same name, the court ordered the trustees to be appointed by both societies.<sup>3</sup>

§ 715. If a gift is made for a purpose called charitable, it will not be upheld if it contravenes an express provision of law, or if it is for a purpose forbidden by public policy. In other words, courts will not allow, or carry into effect, charitable donations which tend to a breach of the laws of the land. Thus a gift for procuring the discharge of persons confined under sentence for a breach of the criminal laws is void.<sup>4</sup> But a gift to aid fugitive slaves in escaping from slavery was not held illegal, on the ground that there were many ways in which it could be employed that would not be contrary to law.<sup>5</sup> In England, a gift to promote a religious faith, contrary to the statute, was void.<sup>6</sup> So all gifts to superstitious uses, so called, such as praying for the souls of the dead, (a) maintaining *obit* lamps, and for other similar

<sup>1</sup> *Cole v. Adams*, 6 Beav. 353. See *Down v. Worrall*, 1 My. & K. 561.

<sup>2</sup> *Harding v. Glyn*, 1 Atk. 469; *Cole v. Wade*, 16 Ves. 44; *Down v. Worrall*, 1 My. & K. 561; *Marlborough v. Godolphin*, 2 Ves. 61; *Brown v. Higgs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561.

<sup>3</sup> *First Cong. Soc. of Southington v. Atwater*, 23 Conn. 56.

<sup>4</sup> *Thrupp v. Collett*, 26 Beav. 125; *Russell v. Jackson*, 10 Hare, 204.

<sup>5</sup> *Jackson v. Phillips*, 14 Allen, 570.

<sup>6</sup> *De Themmines v. De Bonneval*, 5 Russ. 288; *Da Costa v. De Pas*, Amb. 228; 2 Swanst. 487, n.; 1 Dick. 258; *Finley v. Hunter*, 2 Strob. Eq. 218; *Johnson v. Clarkson*, 3 Rich. Eq. 305; *Lusk v. Lewis*, 32 Miss. 297.

(a) A bequest in trust to pay for masses for the dead is valid, though *no cestui que trust* is named. *Reichenbach v. Quin*, 21 L. R. Ir. 138; *Schouler, Petitioner*, 134 Mass. 426; *Teele v. Bishop of Derry*, 168 Mass. 341; *Sherman v. Baker* (R. I.), 40 Atl. 11; 40 L. R. Ann. 717, and note; *Hoeffler v. Clogon*, 171 Ill. 462; *Seibert's Appeal* (Penn.), 18

objects, in the struggle of the Reformation and afterwards, were held to be against public policy and void. But in this country, where all religious denominations, doctrines, and forms of worship are tolerated, or rather protected, so long as the public peace is not disturbed, there can be in the law no such thing as a superstitious use.<sup>1</sup> The most common illustration of the rule that courts will not uphold gifts for charitable purposes where such gifts contravene some law, is found in the numerous cases that have arisen under the English statute of mortmain, 9 George II. c. 36, and other similar statutes, which enacted that no lands, hereditaments, or money to be laid out in lands, shall be given for any religious or charitable purpose, except by deed executed in the presence of two witnesses twelve months before the death of the donor, and enrolled as therein directed. Under this statute, an immense number of charitable bequests have been defeated, because they contravened the law. As we have no such statutes in America, the cases, and the rules established by them, are not stated. They only serve to illustrate other branches of the law in the United States, but have no direct practical application.<sup>2</sup> In New York and Pennsylvania there are statutes upon the subject; and in New York a corporation cannot take lands in trust for a charity for purposes other than those for which the corporation was chartered.<sup>3</sup> And so, if a corporation already holds

<sup>1</sup> *Methodist Church v. Remington*, 1 Watts, 218; *Gass v. Wilhite*, 2 Dana, 170; *Magill v. Brown*, Brightly, 373.

<sup>2</sup> Those who desire to see the learning and the cases upon the English statute of mortmain, may consult 2 Jarman on Wills, pp. 200-224; Tudor on Charities, 93, 101; 2 Redf. on Wills, pp. 508-516 (2d ed.).

<sup>3</sup> In Pennsylvania, Act 1855 provides that no real or personal property W. N. Cas. 276; *Kerrigan v. Tabb*, (2d ed.), 211; *Moran v. Moran*, 104 (N. J. Eq.), 39 Atl. 701; *contra*, in Iowa, 216; *Harrison v. Brophy*, 59 England and Wisconsin, and Ala. Kans. 1. In New York, such a bequest was held invalid, but it is now valid under the statute of 1893, 166; see note to s. c. in 65 Am. St. Rep. 106, 118; *Festorazzi v. ch. 701. Holland v. Alcock*, 108 St. Joseph's Cath. Church, 104 Ala. N. Y. 312; *In re Zimmerman's* 327, and see 1 Ames on Trusts Will, 50 N. Y. S. 395.

all the property it is authorized to take under its charter, a gift to it for charitable purposes lapses.<sup>1</sup>

§ 716. If the objects and purposes for which a trust is intended to be created is once determined to be charitable within the intent of the law, and if the trust contravenes no law or rule of public policy, courts are bound to give effect to it, if possible, in the exercise of their chancery powers. Of course, in carrying into effect public charities, rules suitable and adequate to the purpose must be applied. Where a testatrix gave £2,000 to a trustee for the purpose of enabling him to give it to either branch of the testatrix's family, as he deemed most prudent, and the trustee died without disposing of the fund, the court said that the trust was too indefinite to be executed in favor of individuals.<sup>2</sup> But if a trust is created for the education of six orphans, to be selected from a certain district by the trustees, and the power can be executed by the trustees or their successors, there certainly is no difficulty in carrying the trust into execution. A trust created for the relief of the poor must, of course, be administered differently from a trust to pay the income to an individual, and the rules applicable to a charitable trust must, in the nature of things, differ from the rules governing a private trust. Both sets of rules are equally within the

shall be given to charitable uses, except by deed or will attested by two credible or disinterested witnesses, at least one calendar month before the decease of the testator or grantor. See *McLean v. Wade*, 41 Penn. St. 266; *Taylor v. Mitchell*, 57 id. 209; *Miller v. Porter*, 53 id. 297.

In New York, Act 1848, c. 319, provides that no person, having a wife, child, or parent, shall give more than one-fourth of his estate to charitable corporations, and no gift by will shall be valid unless executed at least two months before his death. Act of 1860 enabled a person to give one-half of his estate in certain cases. See *Levy v. Levy*, 33 N. Y. 114; *Harris v. Slaght*, 46 Barb. 470; *White v. Howard*, 52 Barb. 294; *Harris v. American Bib. Soc.*, 2 N. Y. Dec. 36. In Georgia, a will must be made ninety days before the death of the testator, if there is a wife and child or issue of a child of the testator, or a charitable bequest in such will is void. *Reynolds v. Bristow*, 37 Ga. 283.

<sup>1</sup> *Cronnin v. Louisville, &c. Soc.*, 3 Bush, 365.

<sup>2</sup> *Stubbs v. Sargon*, 2 Keen, 255.

chancery powers of the American courts. A trust to give a sum of money to an individual named is certain; and so a trust to distribute a sum of money in charity to the poor of a certain district is certain, according to its own nature. To apply the same rules to subjects so diverse would be to subvert the administration of law.

§ 717. In dealing with the subject of charities, courts, in many cases, seem to suppose that there is need of some extraordinary powers to carry them into effect: they have used expressions which indicate a supposition that their ordinary equity powers were not sufficient to give effect to many charitable bequests. The fact is, that the ordinary judicial powers of courts of equity, applied properly to the subject-matter, are sufficient to carry into effect almost all charitable bequests. The professional mind of America has labored over the doctrine of *cy près* as it is called, and has seemed to suppose that most charitable bequests cannot be carried out without the aid of some arbitrary power. It is proposed to examine the doctrine of *cy près*, and afterwards to state the rules in relation to certainty in the trustees for a charity and in relation to certainty in the objects or beneficiaries of a charity.

§ 718. In studying the cases upon charitable uses, cited in the preceding sections, it is necessary to bear this suggestion constantly in mind: in England the court of chancery, or the Lord Chancellor, exercised a double function, — the one a judicial function, in adjudicating upon the legal questions arising upon charitable gifts; the other a ministerial function, as the keeper of the king's conscience. The general superintendence or administration of all charities was in the king as *parens patriæ*. The judicial part of this administration the king intrusted to the ordinary equity jurisdiction of the court of chancery. That part of the king's jurisdiction over charities which did not come within the ordinary equity jurisdiction of the court, the king exercised as part of his prerogative by his sign-manual. The chancellor often exer-

cised this prerogative power of the king; and thus many charities have been established and administered by the chancellor, and no very clear line has been drawn between those established by him exercising his ordinary judicial power in the court of chancery, and those established by the extraordinary or prerogative power of the crown exercised through the chancellor. Thus, if gifts were made for charitable uses that were illegal or contrary to public policy, or that were impossible to be carried into effect, the king, as general supervisor of charities, could devote them to such other charitable purposes, *cy près* the original gift, as he pleased. This he did through his prerogative power by his sign-manual, exercised by his chancellor personally, and not judicially. The instances in which such prerogative powers were exercised are reported in the books together with judicial determinations, and thus much misapprehension and confusion have arisen. If gifts were made to establish a Jewish synagogue, to teach Judaism in opposition to Christianity, or to re-establish the supremacy of the pope, or to educate children in the Catholic faith contrary to the statutes, or to promote dissent contrary to the acts of uniformity, or to keep alive superstitious customs and practices, the charities could not, of course, be carried into effect as given, and the king gave effect to them as charities, by his royal prerogative, *cy près* the original purposes.<sup>1</sup> This mode of procedure was founded upon this reasoning: if it appeared that the donor had a general charitable intent, and that the particular form of the charity was not of the substance of the charity, and that the donor did not contemplate that his heir

<sup>1</sup> Att. Gen. *v.* Baxter, 1 Vern. 248; 1 Eq. Ca. Ab. 96, pl. 9; 2 Vern. 105; 7 Ves. 76; Whorwood *v.* University Coll., 1 Ves. 537; De Garcin *v.* Lawson, 4 Ves. 433, n.; Gates *v.* Jones, 2 Vern. 266; Smart *v.* Prujean, 6 Ves. 560; Adams *v.* Lambert, 4 Co. 529; Att. Gen. *v.* Fishmongers' Co., 2 Beav. 151; 5 My. & Cr. 11; Crofts *v.* Evetts, Mod. 784; Att. Gen. *v.* Power, 1 Ball & B. 145; Cary *v.* Abbott, 7 Ves. 490; Att. Gen. *v.* Todd, 1 Keen, 803; Da Themmines *v.* De Bonneval, 5 Russ. 288; Briggs *v.* Hartley, 14 Jur. 683; Da Costa *v.* De Pas, 2 Swanst. 487-490; 1 Amb. 288; 1 Dick. 258; Isaac *v.* Gompertz, 1 Ves. Jr. 44; Rex *v.* Partington, 1 Salk. 162, 334; Att. Gen. *v.* Vint, 3 De G. & Sm. 704.

or legal representatives should ever have the property, then the gift should not result or revert to the heir, but should be employed in some legal charity, as near to the original purpose as possible.<sup>1</sup> This seems strange to modern ideas; but if a donor has indicated a general charitable purpose, and has disinherited his heir to that extent, it is no greater outrage upon the donor to devote the gift to some similar charitable purpose, than it is to return it to the heir, and not employ it in charity at all; and so, if a gift for an illegal charity is forfeited to the king, it is not a more objectionable exercise of the royal prerogative to devote that gift to some other charity, *cy près* the original purpose, than to expend it in private indulgence. But whether the prerogatives of the British crown were proper or improper, or whether they were wisely exercised or not in the cases named, is no question here. No such power exists in any American magistrates, judicial or ministerial, and none can exist until it is conferred by the legislature. The cases named are not law in America, and probably nothing like them will ever have a place in its jurisprudence.

§ 719. There is another large class of cases to which the same observations apply. Many of the cases heretofore cited were gifts to *charity* generally, or to *religion*, or to *education*, without indicating when, where, or how the gifts were to be applied or used, and without the appointment of a trustee or other person to select the objects, or appropriate and apply the funds. Gifts have been made to such charitable purposes as should be named thereafter, and none were named; or to such uses as should be directed in a codicil or note in writing, and there was no codicil or note in writing; or to such school as should be appointed, and none was appointed.<sup>2</sup> In these and similar cases, it was assumed that the testator had impressed upon the fund a general charitable purpose forever;

<sup>1</sup> Cary v. Abbott, 7 Ves. 490.

<sup>2</sup> Mills v. Farmer, 1 Mer. 55; Moggridge v. Thackwell, 7 Ves. 36; Att. Gen. v. Syderfin, 1 Vern. 224; 2 Freem. 261; Att. Gen. v. Jackson, 11 Ves. 365; White v. White, 1 Bro. Ch. 12.

that the fund should not go to the heir, or next of kin; and that the king should interpose his prerogative, and by his sign-manual appoint the use, charity, or school, and the manner in which the fund should be expended. The chancellor exercised this power of the king, and many instances of its exercise are in the books.<sup>1</sup> It is plain that to divide a fund, left to *charity* generally, among several asylums, hospitals, and alms-giving institutions, is not a judicial act at all: it is a mere ministerial act, to be regulated by no rules of law, but to be governed by the good sense and sound discretion of the person who makes the division or distribution. There is a wide distinction between a gift to *charity*, and a gift to a *trustee* to be by *him* applied to *charity*.<sup>2</sup> In the first case, the court has only to give the fund to charitable institutions, which is a ministerial or prerogative act; in the second case, the court has jurisdiction over the *trustee*, as it has over all trustees, to see that he does not commit a breach of his trust, or apply the funds in bad faith, or to purposes that are not charitable. In the cases here supposed, if the crown or the chancellor directs a fund given to charity generally, and without the interposition of a trustee, to be divided or distributed to several institutions, there would seem to be no room for the doctrine called *cy*

<sup>1</sup> *Moggridge v. Thackwell*, 7 Ves. 75; *Att. Gen. v. Syderfin*, 1 Vern. 224; *Att. Gen. v. Mathews*, 2 Lev. 167; *Finch*, 245; *Paice v. Archbishop of Canterbury*, 14 Ves. 372; *Clifford v. Francis*, 1 Freem. 330.

<sup>2</sup> In *Brown v. Yeall*, 7 Ves. 50, the gift was for purchasing and distributing such books as may have a tendency to promote the interest of virtue and religion and the happiness of mankind; this charitable purpose to be carried into effect under such persons and according to such regulations as the High Court of Chancery should decree or order. Lord Thurlow, armed with the prerogative power of the king, declined to carry out this charity. It will be observed that the chancellor had the duty, by this will, of appointing trustees or other agents to carry out these purposes, and also of designating, by decree, such books as would promote the interest of virtue, religion, and the happiness of mankind. But if Mr. Bradley had given his money to a trustee with direction to him to purchase and distribute such books as are above named, the trustee might have been compelled to execute the trust in good faith, and according to a sound discretion within the meaning of the will.



*præs* as a judicial doctrine; for such a distribution is a mere arbitrary act, and can, in the nature of things, be governed by no general rules of law. The courts in America have generally declined, in the absence of legislative authority, to administer these indefinite gifts to charity or religion or education or public utility, unless there was a trustee appointed by the testator to exercise his discretion in applying the gift to particular objects or persons.<sup>1</sup>

§ 720. If a testator makes a bequest to trustees to be employed by them in charity, or to be distributed among such charitable institutions as they shall select, or to educate orphans to be selected by them, or generally to be devoted to such charities or purposes of education, religion, or morality as they in their judgment shall judge best, and the trustees have the funds in their possession, and are willing

<sup>1</sup> In 2 Redf. on Wills, p. 518, 2d ed., it is said that "the distinction in England between a class of cases administered in the court of chancery by its ordinary powers, and that where the administration is referred by the king, as *parens patriæ*, to the chancellor, by virtue of the sign-manual, is not important in this country, since both classes of cases are here administered by the courts of chancery, under their ordinary jurisdiction, wherever a jurisdiction for the administration of charitable bequests has been created in equity either by express statute or by the adoption of the principles of the statute of Elizabeth." With due deference to so eminent, learned, and authoritative a jurist and writer, the proposition is respectfully denied. In all the cases the courts have shown a most anxious solicitude to exercise only the ordinary powers of chancery jurisdiction, and not to trench upon any extraordinary or prerogative powers, in order that the governments of the several States may continue in practice, as they are in theory, governments of laws and not of men. It is true that our courts have made mistakes in tracing the line between ordinary jurisdiction and prerogative power, and in some cases they have declined to carry into effect trusts which they might well have administered in the ordinary exercise of judicial powers, for fear of exceeding their jurisdiction; as in *White v. Fisk*, 22 Conn. 31. And again, they have occasionally stepped over the line, as where they have upheld an indefinite charity to the poor, no trustee being interposed. But generally, American courts have erred in not going so far as they might have gone in the exercise of their ordinary judicial powers. See this matter fully and ably discussed by Mr. Justice Gray in *Jackson v. Phillips*, 14 Allen, 576.

to act, courts can and will sustain the charities, and direct the trustees to carry out the will of the testator and exercise the powers confided to them.<sup>1</sup> (a) Thus in *Saltonstall v. Sanders*,<sup>2</sup> where a testator bequeathed the residue of his estate to his executors in trust to hold and invest the same, and to appropriate the whole of the principal or income as they might think proper, in the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence or charity, public or private, or temperance, or for the education of deserving youths; and gave the trustees, their survivors and successors, full power, discretion, and authority to expend the income or capital in such manner as in their judgment would best promote the objects named; and the trustees were in possession of the property, and were willing to perform the trust, if competent and legal for them to do so, — the court established the trust; and this seems to be the law as established by the authorities. In *White v. Fisk*<sup>3</sup> the bequest was, “Any surplus income I

<sup>1</sup> *Everett v. Carr*, 59 Me. 334; *Miller v. Atkinson*, 63 N. C. 537; *Gibson v. McCall*, 1 Rich. L. 174; *Derby v. Derby*, 4 R. I. 414; *Going v. Emery*, 16 Pick. 107; *Wells v. Doane*, 3 Gray, 201; *Att. Gen. v. Pearce*, 2 Atk. 87; *Mitford v. Reynolds*, 1 Phil. 185; *Nightingale v. Goulbourn*, 5 Hare, 484; 2 Phil. 594; *Treat's App.*, 30 Conn. 113.

<sup>2</sup> *Saltonstall v. Sanders*, 11 Allen, 446.

<sup>3</sup> *White v. Fisk*, 22 Conn. 31. Perhaps this case is modified by *Treat's*

(a) In those States, like New York, which do not accept the *cy pres* doctrine, and require a definite beneficiary, the trustees cannot, as elsewhere, select the beneficiary in their discretion. See *In re Piercy*, [1898] 1 Ch. 565; 73 L. T. 732; *In re Delmar's Char. Trust*, [1897] 2 Ch. 163; *Warren v. Clancy*, [1898] 1 Ir. R. 127; *Murphy's Estate*, 184 Penn. St. 310; *In re John's Will*, 30 Oregon, 494; *Hanson v. Little Sisters of the Poor*, 79 Md. 434; *John v. Smith*, 91 F. R. 827; *Tichenor v. Brewer* (Ky.), 33 S. W. 86; *People v. Powers*, 147 N. Y. 104; *Butler v. Trustees*, 92 Hun, 96; *Fairchild v. Edson*, 154 N. Y. 199; *Livesey v. Jones*, 55 N. J. Eq. 204. See *Fifield v. Van Wyck*, 94 Va. 557; *Meeker v. Puyallup*, 5 Wash. St. 759. Where the trust is valid, the trustees may appoint the fund to an institution established after the trustee's death. *Hayes v. Pratt*, 147 U. S. 557, 567. A charitable bequest to an institution which ceases to exist between the date of the will and the testator's death lapses and falls into the residue. *In re Rymer*, [1895] 1 Ch. 19.

direct my trustees to expend for the support of indigent pious young men, preparing for the ministry in New Haven," and the court declared that they had no power to execute the trust, or to make a selection of the young men to be supported and educated. It does not appear in this case whether the trustees were willing to perform the duties imposed upon them by the will; but if the trustees were willing to accept and execute the trust, there was no extraordinary jurisdiction for the court to exercise, and the trust might well have been upheld. The court was merely required to see that the trustees executed the powers within the true meaning and scope of the will, and if there was a breach of trust, to deal with it as they would with any other breach of trust. It may be said that it would be difficult to establish a breach of trust because of its uncertainty; but certainly it would not be difficult to determine whether the money was expended by the trustees in the support and education of young men studying for the ministry in New Haven.<sup>1</sup> If the trustees named had died before the testator, or refused to act, another question would have arisen which was not discussed in the case.

§ 721. If a testator gives an estate to trustees to be applied to charity generally, or to such charitable purposes and institutions as they in their discretion shall judge best, and the trustees die before the testator, or make no selection of the objects or application of the fund, or decline to act, the court will be governed by the intent of the donor, to be gathered from the interpretation of the whole instrument, in determining the question whether they can appoint new trustees to exercise the power and discretion given to the trustees named in the will.<sup>2</sup> Thus in *Lorings v. Marsh*,<sup>3</sup> it was held that the

App., 30 Conn. 113, where quite as indefinite a power of selection was given to trustees, and the trust was upheld. And see *Norris v. Thompson*, 4 Green, Ch. 307.

<sup>1</sup> *Pulpress v. African Church*, 48 Penn. St. 204.

<sup>2</sup> *Att. Gen. v. Fletcher*, 5 L. J. (N. S.) Ch. 75; *Att. Gen. v. Boulbee*, 2 Ves. Jr. 380; 3 Ves. Jr. 220; *Att. Gen. v. Glegg*, 1 Atk. 356.

<sup>3</sup> *Lorings v. Marsh*, 2 Clifford, 469; 6 Wallace, 337; *Marsh v. Renton*,

discretion and power given to the trustees named in the will did not create a personal trust and confidence in them, because power and discretion were given to them and *their successors*. In *Fontain v. Ravenel*, the court held the power and discretion in the trustees named in the will, to distribute the fund among charitable institutions, as they should think best, to be a personal trust and confidence in them, and, as they had died before the power could be executed, no others could execute it. As the trust was too indefinite to be executed by the court in its judicial capacity, and without calling in the aid of a prerogative power, it failed, and the fund went to the next of kin. This is, without question, the general law in relation to private trusts; and if this construction, applied to bequests for charitable uses, carries out the true intent of the donor, it is the best rule to follow. In applying such a rule to charitable gifts, courts would undoubtedly consider that the testator intended to make an effectual disposition of his property for the general purposes named and that he intended the power to be exercised when the occasion arose, and not before. Thus, in the case of *Fontain v. Ravenel*,<sup>1</sup> the power was not to be exercised until the death of the testator's wife, and it is hardly to be supposed that the testator intended that the charitable purposes of his will should be defeated, if his wife happened to outlive his other trustees, a contingency which the court thought was unprovided for. On the contrary, it is not a violent construction to presume that the testator intended the power to be executed by the trustees in possession of the fund at the time the power could first be exercised, although the power did not in terms extend to them. Again, there are classes of indefinite trusts where the trustees must exercise a continuing power and discretion in the selection of objects of the charity. Successors to the trustees appointed in the

9 Allen, 132; *Att. Gen. v. Gladstone*, 13 Sim. 7; *Reeve v. Att. Gen.*, 3 Hare, 191; *Att. Gen. v. Glegg*, 1 Atk. 356.

<sup>1</sup> *Fontain v. Ravenel*, 17 How. 382; *Zeisweiss v. James*, 63 Penn. St. 425; *Att. Gen. v. Doyley*, 4 Vin. 485; 2 Eq. Cas. Ab. 194; 7 Ves. 58, n.; 16 Ves. 47; *Hibbard v. Lambe*, Amb. 309; *Cole v. Wade*, 16 Ves. 45; *Eaton v. Smith*, 2 Beav. 236; *Hill on Trustees*, 211.

will, though not named, would have the right to exercise the power from the clear intent of the testator.<sup>1</sup>

§ 722. If a donor makes a gift in trust for a particular charitable purpose, as to establish a particular school, hospital, asylum, or other charitable institution, and appoints no trustee; or the trustee appointed by him is incapable of taking the gift, and of acting in that behalf; or if the trustee dies before the testator, or declines to act; or if trustees are named or appointed who are not *in esse*, but are to come into existence thereafter, as by an act of incorporation, — courts of equity, in the exercise of their ordinary jurisdiction, can establish the charity; for it is their invariable practice not to allow a legal and valid trust to fail for want of a trustee. (a) Therefore courts will appoint trustees in such cases to take up and carry out the clear purposes of the donor, and they will order the heir or legal representatives to hold the fund upon the declared trust, until trustees can be appointed to execute the trust as contemplated.<sup>2</sup> In exercising this jurisdiction, courts are called upon to exercise no extraordinary or prerogative powers.<sup>3</sup> In the matters thus far discussed in the four preceding sections, there is no room for the *cy près* doctrine, as it is called, as a *judicial* doctrine. So far as courts have sustained charities, as courts, they have sustained them within the strict limits of ordinary chancery jurisdiction. Where illegal or indefinite charities, without trustees with powers to determine the definite purposes, have been sustained and carried into effect *cy près*, it has been done by the sovereign power as an act of prerogative and grace. Lord Eldon expressed the rule when he said: "I have conversed with many persons upon it. I have had great difficulty in my own mind, and have found great difficulty in

<sup>1</sup> See *Moore v. Moore*, 4 Dana, 366; *Down v. Worrall*, 1 My. & K. 561; *Green v. Allen*, 5 Humph. 170; *Griffin v. Graham*, 1 Hawks, 96; *Williams v. Pearson*, 38 Ala. 299.

<sup>2</sup> *Reeve v. Att. Gen.*, 3 Hare, 191; *Inglis v. Sailors' Snug Harbor*, 3 Peters, 99; *Hayter v. Trego*, 5 Russ. 113; *Denyer v. Druce*, Taml. 32.

*Williams v. Pearson*, 38 Ala. 299.

(a) *Sears v. Chapman*, 158 Mass. 400.

the mind of every person I have consulted; but the general principle thought most reconcilable to the cases is, that where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign-manual; but where the execution is to be by a trustee with general or some objects pointed out, then the court will take the administration of the trust."<sup>1</sup>

§ 723. But there are cases in which courts, in the strict discharge of their judicial duty, may well apply a fund devoted to a particular charity to a cognate purpose, to prevent a failure of justice, and to protect trustees in applying moneys in their hands to some useful purposes. Thus where there was a bequest to trustees to apply part of a fund to the redemption of British slaves in Turkey and Barbary; and, after a time, there ceased to be British slaves to redeem; and the fund had accumulated for many years; the court directed the trustees to apply the income to kindred charities, as nearly like the original purpose as possible. The court indicated what was the probable *cy près* purpose of the testator in case of the failure of his original purpose.<sup>2</sup> *Cy près*, as applied to judicial acts, is a rule of construction and not of administration. The judgment of the court, in this last case, may be sustained as a judicial act, on the ground that the court construed such an application of the funds, upon the failure of the first purpose, to be within the probable intention of the donor. To say that a donor had no intention, under such circumstances, is to beg the question to be determined by construing the written instrument; for Lord Brougham has very forcibly said, that, if the construction shows that the fund was to be employed in the way pointed out forever, *and in no other way*,<sup>3</sup> then all *cy près* construction must fail. And so it may be said that if the construction of the written instrument bears out the assertion that the donor had no intention, in case of the failure of his first

<sup>1</sup> *Moggridge v. Thackwell*, 7 Ves. 36; *Paice v. Canterbury*, 14 Ves. 372; *Boyle*, 241; *Everett v. Carr*, 59 Maine, 334.

<sup>2</sup> *Att. Gen. v. Ironmongers' Co.*, 2 Beav. 313; 1 Cr. & Phil. 508; 10 Cl. & Fin. 908. <sup>3</sup> *Att. Gen. v. Ironmongers' Co.*, 2 My. & K. 576.

purpose, the charity must fail on the failure of objects to which to apply it. In giving a construction to an instrument under such circumstances, courts consider the whole instrument in the light of all the circumstances, and conclude, from the will and all the facts, what was the probable intention of the testator. As, in construing a deed under doubtful circumstances, it is construed most strongly against the grantor, and most favorably for the grantee, so courts lean to a construction in favor of charity, rather than against it. It may be said with truth, that the presumption of an intention in the donor is very slight; but the presumption on which action is based in many human affairs is very slight; and if the conclusion arrived at is unsatisfactory, it must be remembered that the construction of any written instrument many years after its date, and amid an entirely new order of things, and when many unexpected events have occurred, is always unsatisfactory, and the result arrived at is at best but a probable one.<sup>1</sup> In New York the *cy près* power which constitutes the peculiar feature of the English system of dealing with charities, and is exercised in determining gifts where the donor has failed to define them, and in framing schemes of approximation to the donor's design, has no existence.<sup>2</sup> In Rhode Island the courts have the same *cy près* power as the English chancery.<sup>3</sup>

§ 724. Where bequests were made to trustees to be expended in the circulation of books, newspapers, the delivery of speeches, lectures, and such other means as in their judgment will create a public sentiment that will put an end to negro slavery in the United States, and for the benefit of fugitive slaves escaping from the slave-holding States;<sup>4</sup> and

<sup>1</sup> See *Popkin v. Sargent*, 10 Cush. 327.

<sup>2</sup> *Holland v. Alcock*, 108 N. Y. 312, 330.

<sup>3</sup> See for R. I. Charity Law, *Pell v. Mercer*, 14 R. I. 412; *R. I. Hospital Trust Co. v. Olney*, id. 449.

<sup>4</sup> *Jackson v. Phillips*, 14 Allen, 539. In this case, the only question (it being established that it was a good charity) was whether, the purpose of the testator being accomplished by the abolition of slavery, he intended that the fund, if any remained, should revert to his heirs. It is quite

afterwards slavery was abolished, so that there could be no objects as specially designated in the will to which the charity could attach, the court, in construing the whole will, determined that it was the intention of the testator to establish a permanent charity for the benefit of the colored race, and that it was his intention, in case the special purposes named in the will should fail, that the funds should be applied to the nearest similar use. The court, in making this decision, disclaims the exercise of any prerogative power, and it founds its judgment upon the ordinary right and duty of courts to construe written instruments, and to carry the intention of parties to written instruments into effect when such intention can be discovered with reasonable probability. There can be no dispute as to the duty of the court to construe written instruments in order to ascertain the intention of the parties thereto, and there can be no question that it is the duty of courts to carry such intention into effect as near as may be when it can be done consistently with the law of the land. If, therefore, the purposes of a charity named in a will fail, and there are no objects to which to apply the funds, the court must read the whole will in order to determine whether the charitable intention of the testator has come to an end, and the fund must revert to the heir or personal representative; or whether a probable intention can be gathered from the instrument, that, in the event which has happened, the donor intended that his gift should be applied *cy près* the original purpose.<sup>1</sup>

plain that he did not expect his purpose would be accomplished so soon, or till long after his gift was exhausted, as he provided for other gifts to be added to his own, and so far it is plain that he did not contemplate or intend that his heirs should take any part of his gift.

<sup>1</sup> Att. Gen. *v.* Pyle, 1 Atk. 435; Att. Gen. *v.* Vint, 3 De G. & Sm. 705; Att. Gen. *v.* Lawes, 8 Hare, 32; Att. Gen. *v.* Green, 2 Bro. Ch. 492; Moggridge *v.* Thackwell, 3 Bro. Ch. 517; 1 Ves. Jr. 464; Att. Gen. *v.* Whitchurch, 3 Ves. 143; Att. Gen. *v.* Guise, 2 Vern. 166; Att. Gen. *v.* Baliol Coll., 9 Mod. 407; Att. Gen. *v.* Glasgow Coll., 2 Coll. 665; 1 H. L. Ca. 800.

The cases, both in England and this country, wherein the doctrine of *cy près*, in its several aspects, is considered and applied, are collected and



§ 725. Where a fund was given to found a school for the education of the poor within a certain district, and by an explained by Mr. Justice Gray, in his very elaborate opinion in *Jackson v. Phillips*, 14 Allen, 574-694, an abstract of which is here given.

In England, there are two distinct powers exercised by the chancellor in charity cases, under this doctrine of *cy près*, — the one derived from the royal prerogative, the other in the exercise of judicial authority. The disposition of a charity under the royal prerogative finds no counterpart in this country. The English cases under this head may be divided into two classes: (1) Requests to uses charitable, but illegal, as to a form of religion not tolerated. *Att. Gen. v. Baxter*, 1 Vern. 248; 2 Vern. 105; 1 Eq. Cas. Ab. 96; 7 Ves. 76; *Da Costa v. De Pas, Amb.* 228; 2 Swanst. 489, note; 1 Dick. 258; *Rex v. Partington*, 2 Salk. 162. See 4 Dane, Ab. 239; *Gass v. Wilhite*, 2 Dana, 176; *Methodist Church v. Remington*, 1 Watts, 226; and comments of Lord Thurlow in *Moggridge v. Thackwell*, 1 Ves. Jr. 469, and of Sir Wm. Grant in *Cary v. Abbott*, 7 Ves. 494. (2) Gifts to charity generally, with no trustee interposed, and no appointment provided for, or the power of appointment delegated to a person who dies without exercising it. *Boyle on Char.*, 238; *Att. Gen. v. Syderfin*, 1 Vern. 224; 1 Eq. Cas. Ab. 96; *Att. Gen. v. Fletcher*, 5 L.J. (N. S.) Ch. 75. See *Moggridge v. Thackwell*, *sup.*; *Dwight's Argument in Rose Will Case*, 272. This power exercised by the English courts does not exist in any court in this country. 4 Kent, 508, note; *Fontain v. Ravenel*, 17 How. 369, 384; *Moore v. Moore*, 4 Dana, 365; *Whitman v. Lex*, 17 S. & R. 93; *Att. Gen. v. Jolly*, 1 Rich. Eq. 108; *Dickson v. Montgomery*, 1 Swan, 348; *Le Page v. McNamara*, 5 Iowa, 146; *Bartlett v. King*, 12 Mass. 545; *Sohier v. Mass. Gen. Hosp.*, 3 Cush. 496.

But the application of the *cy près* doctrine, in the exercise of a general equity jurisdiction, stands upon very different grounds, and is favored in this country, as well as in England. It existed prior to the Stat. of 43 Eliz. *Symm's Case*, Duke, 163; *Reade v. Silles*, Acta Canc. 559; 1 Spence, Eq. 588, note; *Parker v. Brown*, 1 Col. Pr. Ch. 81; 1 My. & K. 389; *Dwight's Cha. Ca.* 33; *Parrot v. Pawlett*, Cary, 47; *Elmer v. Scott*, Choice Ca. Ch. 155; *Matthew v. Marow*, and *Hensman v. Hackney*, *Dwight's Cha. Ca.* 65, 77; *Tudor*, 102, 103. For authorities on this point in this country, see *Vidal v. Girard*, 2 How. 194-196, and cases cited; *Perrin v. Carey*, 24 How. 501; *Magill v. Brown*, Brightly, 346; 2 Kent, 286-288, and note; *Burbank v. Whitney*, 24 Pick. 152; *Preachers' Aid Soc. v. Rich*, 45 Me. 559; *Derby v. Derby*, 4 R. I. 436; *Urmey v. Wooden*, 1 Ohio St. 160; *Chambers v. St. Louis*, 29 Mo. 543.

The discretion of the chancellor to depart from the express intent of the founder of a charity was not enlarged, but was intended rather to be

act of Parliament the whole district was taken for a dock, so that all the objects of the charity as specified in the will

limited, by Stat. of 43 Eliz. See statute, *ante*, § 692; also Lord Coke, 2 Inst. 712, and Duke, 11, 156, 169, 372, 619; Lord Eldon in *Att. Gen. v. Brown*, 1 Swanst. 291; 1 Wils. Ch. 354; Lord Redesdale in *Att. Gen. v. Mayor of Dublin*, 1 Bligh, N. R. 347, and *Corporation of Ludlow v. Greenhouse*, id. 48, 62; Lord Keeper Bridgman in *Att. Gen. v. Newman*, 1 Ch. Ca. 158; Sir Joseph Jekyll, in *Eyre v. Shaftesbury*, 2 P. Wms. 119; Lord Hardwicke, in *Att. Gen. v. Middleton*, 2 Ves. Sen. 328; *Att. Gen. v. Carroll*, Acta Canc. 729; *Dwight's Argument*, 259-268; *Tudor*, 161, 162. In Massachusetts, *Going v. Emery*, 16 Pick. 119; *County Attorney v. May*, 5 Cush. 338; *Gen. Stat. c. 14*, § 20.

A fund given to trustees for a specified charitable purpose, lawful and valid at the testator's death, if no intention is expressed to limit it to a particular institution or mode of application, and afterwards the scheme becomes impracticable or illegal, having once vested as a charity, is to be applied by a court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular intention — *cy près* — as possible. *Att. Gen. v. Warrick*, *Dwight's Cha. Ca.* 140; *West*, Ch. 60, 62; *Bloomfield v. Stowe Market*, Duke, 644; *Att. Gen. v. Guise*, 2 Vern. 166; *Att. Gen. v. Baliol College*, 9 Mod. 407; *Att. Gen. v. Glasgow Coll.*, 2 Col. C. C. 665-674; 1 H. L. Cas. 800-826; 2 Vern. 267, note; 3 Ves. 650, note; *Att. Gen. v. Hicks*, *Highmore on Mortmain*, 336-354; 3 Bro. Ch. 166, note; *Att. Gen. v. Craven*, 21 Beav. 392, 408; *Att. Gen. v. Pyle*, 1 Atk. 435; *Att. Gen. v. Green*, 2 Bro. Ch. 492; *Att. Gen. v. Bishop of London*, 3 Bro. Ch. 171; *Moggridge v. Thackwell*, id. 517; 1 Ves. Jr. 464; *Att. Gen. v. Glyn*, 12 Sim. 84; *Att. Gen. v. Lawes*, 8 Hare, 32; *Att. Gen. v. Vint*, 3 De G. & Sm. 705; *Att. Gen. v. Boulton*, 2 Ves. Jr. 387; *Att. Gen. v. Whitechurch*, 3 Ves. 143; *Att. Gen. v. Minshall*, 4 Ves. 14. Lord Eldon held a gift to a person, in trust for such charitable purposes as he should appoint, to be good. *Moggridge v. Thackwell*, 7 Ves. 36; 13 Ves. 416; *Paice v. Archbishop of Canterbury*, 14 Ves. 364; *Mills v. Farmer*, 19 Ves. 483; 1 Mer. 55. The American cases on this point are *Wells v. Doane*, 3 Gray, 201; *Fontain v. Ravenel*, 17 How. 387; *Moore v. Moore*, 4 Dana, 336; *Lorings v. Marsh*, 6 Wallace, 337. Where the charitable gift never took effect at all for various reasons, see *Jones v. Williams*, Amb. 651; *Att. Gen. v. Whitechurch*, 3 Ves. 141; *Smith v. Oliver*, 11 Beav. 481; *Att. Gen. v. Bishop of Oxford*, 1 Bro. Ch. 444, note; cited 2 Cox, Ch. 365; 2 Ves. Jr. 388, and 4 Ves. 431; *Cherry v. Mott*, 1 My. & Cr. 123; *Marsh v. Means*, 3 Jur. (N. S.) 790.

Cases upon this subject relating to redemption of captives and slaves, where the captives and slaves intended to be benefited no longer exist: *Betton's Charities*; *Att. Gen. v. Ironmongers' Co.*, 3 My. & K. 576; 2 Beav. 313; *Cr. & Ph.* 208; 10 Cl. & Fin. 908; *Lady Mico's Charity*,

failed, the court directed the funds to be applied under a scheme *cy près* the original purpose, on the ground that such

cited, Att. Gen. *v.* Gibson, 2 Beav. 317, note ; also, Cr. & Ph. 226, 228, and Jackson *v.* Phillips, 14 Allen, 539.

There is no adjudication of this question in the Supreme Court of the United States. Bap. Assoc. *v.* Hart's Ex'rs, 4 Wheat. 1, and Wheeler *v.* Smith, 9 How. 79, arose under the law of Virginia. See 2 How. 192 ; 24 How. 501 ; 4 Met. 380 ; 12 Gray, 593 ; 2 Kent, Com. 287. In *Fontain v. Ravenel*, 17 How. 369, the executor died without appointing the disposition of the charity ; and the court held it not to be within the equity jurisdiction of the court, and nothing could reach it but the prerogative power, which did not exist in the court. In Maryland and Virginia, the Stat. of 43 Eliz. has been expressly repealed, and charities are treated as other trusts. *Dashiell v. Att. Gen.*, 5 H. & J. 392 ; *Gallego v. Att. Gen.*, 3 Leigh, 450, and so in New York the court has finally decided. *Bascom v. Albertson*, 34 N. Y. 584. In North Carolina there is some conflict ; but the view of Maryland and Virginia is now adopted. *Griffin v. Graham*, 1 Hawks, 96 ; *McAuley v. Wilson*, 1 Dev. Eq. 276 ; *Holland v. Peck*, 2 Ired. Eq. 255. In Alabama, see *Carter v. Balfour*, 19 Ala. 830. On the other hand, in Kentucky, the courts sustain the distinction between the prerogative power and the equity jurisdiction. *Moore v. Moore*, 4 Dana, 366 ; *Gass v. Wilhite*, 2 Dana, 177 ; *Curling v. Curling*, 8 Dana, 38. In Pennsylvania, the power exercised under the sign-manual does not exist. *Methodist Church v. Remington*, 1 Watts, 226, and *Whitman v. Lex*, 17 S. & R. 93 ; but in *Philadelphia v. Girard*, 45 Penn. St. 27, the court sustains the *cy près* doctrine, when clearly within the equity power of the court. See Stat. in Pa. 1855. So in South Carolina and Illinois. Att. Gen. *v.* Jolly, 1 Rich. Eq. 99 ; 2 Strob. Eq. 395 ; *Gilman v. Hamilton*, 16 Ill. 231. In all the New England States, except Connecticut, the doctrine of *cy près* as a judicial power has been countenanced, or left an open question. *Burr v. Smith*, 7 Vt. 287 ; *Sec. Cong. Soc. v. First Cong. Soc.*, 14 N. H. 330 ; *Brown v. Concord*, 3 N. H. 296 ; *Derby v. Derby*, 4 R. I. 439 ; *Tappan v. Deblois*, 45 Me. 131 ; *Howard v. Amer. Peace Soc.*, 49 Me. 302 ; *Treat's App.*, 30 Conn. 113. See also 2 Red. on Wills, 815, note ; *McCord v. Ochiltree*, 8 Black. 15 ; *Beall v. Fox*, 4 Ga. 427 ; *Chambers v. St. Louis*, 29 Mo. 592 ; *Lepage v. McNamara*, 5 Iowa, 146 ; *McIntyre v. Zanesville*, 18 Ohio St. 352.

In Massachusetts, the Stat. of 43 Eliz. has always been considered part of the common law. 4 Dane, Ab. 6, 238 ; *Earle v. Wood*, 8 Cush. 445 ; *Anc. Chart.* 52 ; *Drury v. Natick*, 10 Allen, 180 ; *Odell v. Odell*, id. 1, 6 ; *Dexter v. Gardner*, 7 Allen, 243 ; *Burbank v. Whitney*, 24 Pick. 146 ; *Bartlett v. Nye*, 4 Met. 378 ; *Washburn v. Sewall*, 9 Met. 280 ; *Univ. Soc. v. Fitch*, 8 Gray, 421 ; *Wells v. Doane*, 3 Gray, 201 ; *Saltonstall v. Sanders*, 11 Allen, 446, and *Winslow v. Trowbridge*, therein cited ; *Harvard*

must have been the intention of the donor.<sup>1</sup> So where property is given in trust, and sums certain are directed to be paid out of the income to several different charitable purposes, and one of them fails, the circumstance that the donor has named other charities for other parts of the income is a circumstance to be used in the construction of the instrument, to determine whether the donor intended that, in case of the failure of one purpose, the whole fund should be applied to the others; but such circumstance, though of importance, is not always controlling<sup>2</sup> in the construction. So where property is given in trust, and certain sums from the income are devoted to separate charitable purposes, in such manner as to exhaust the whole income at the time when the property was first given to charity, and afterwards the income increases, so that there is a surplus not appropriated to any charity named, the court must resort to a construction of

*Coll. v. Soc. for promoting Theo. Educ.*, 3 Gray, 280; *Baker v. Smith*, 13 Met. 34; *Trustees of Smith's Char. v. Northampton*, 10 Allen, 498; *Winslow v. Cummings*, 3 Cush. 358; *Bliss v. Amer. Bible Soc.*, 2 Allen, 334; *Amer. Acad. v. Harvard Coll.*, 12 Gray, 582. In this last case, the decision was by Chief Justice Shaw; and the same principle was recognized or assumed in 4 Dane, Ab. 242, 243, and *Sanderson v. White*, 18 Pick. 333, and cases cited; 13 Met. 41; 3 Gray, 282, 298; 10 Allen, 501, 502.

There is a class of cases where the gift is distinctly limited to particular persons or establishments, and upon a change of circumstances the doctrine of *cy près* does not apply. *Russell v. Kellett*, 3 Sm. & Gif. 264; *Clark v. Taylor*, 1 Dr. 642; *Incorp. Soc. v. Price*, 1 Jon. & Lat. 498; 7 Ir. Eq. 260; *In re Clergy Soc.*, 2 K. & J. 615; *Marsh v. Att. Gen.*, 2 J. & H. 61; *Winslow v. Cummings*, 3 Cush. 358; *Bliss v. Amer. Bible Soc.*, 2 Allen, 334; *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Att. Gen. v. Columbine*, Boyle, Char. 204, 205; *Potter v. Thurston*, 7 R. I. 25; *Dexter v. Gardner*, 7 Allen, 243. But see *Venable v. Coffman*, 2 W. Va. 310.

<sup>1</sup> *Att. Gen. v. Glyn*, 12 Sim. 81; *Att. Gen. v. London*, 3 Bro. Ch. 171, 1 Ves. Jr. 243; *Att. Gen. v. Craven*, 21 Beav. 392; *Att. Gen. v. Boulbee*, 2 Ves. Jr. 380; 3 Ves. 220; *Att. Gen. v. Hicks High. on Mort.* 336-354; *In re St. John's Church*, 3 Ir. Eq. 335.

<sup>2</sup> *Att. Gen. v. Ironmongers' Co.*, 2 Beav. 313; Cr. & Ph. 308; 3 Bro. Ch. 166, n.; 10 Cl. & Fin. 908; *Att. Gen. v. Llandaff*, 2 My. & K. 586, cited *Mills v. Farmer*, 19 Ves. 483; *Martin v. Margham*, 14 Sim. 230; *Loscombe v. Winteringham*, 13 Beav. 87; *Coldwell v. Home*, 2 Sm. & Gif. 31; *Att. Gen. v. Lawes*, 8 Hare, 32.

the instrument to determine what use to make of the surplus in accordance with the probable intention of the donor. No general rule can be laid down, but each case must depend upon the particular instrument and the facts, and the discretion of the court.<sup>1</sup> Thus, sometimes the money will be applied to increase the number of charitable objects, sometimes to increase the amount to be paid to the objects named, sometimes to founding new charities *cy près* the others named in the will, and sometimes the whole increase will go to one particular object of the testator's bounty.<sup>2</sup> In some cases the trustees will take the surplus beneficially.<sup>3</sup> If a fund decreases in value, so that the original purposes of the charity cannot be accomplished, the scheme of the charity may be changed *cy près*.<sup>4</sup>

§ 726. It is further to be observed, that if the object of the testator's bounty is not a public benefit or charity, but some

<sup>1</sup> Att. Gen. *v.* Marchant, L. R. 3 Eq. 424.

<sup>2</sup> Att. Gen. *v.* Minshull, 4 Ves. 11; Att. Gen. *v.* Coopers' Co., 19 Ves. 187; *Ex parte Jortin*, 7 Ves. 340; Att. Gen. *v.* Galway, 1 Beav. 298; 1 Moll. 95; Anon., 2 J. & W. 320, cited Att. Gen. *v.* Rochester, 5 De G., M. & G. 797; Ashton's Char., 27 Beav. 115; Att. Gen. *v.* Ironmongers' Co., 10 Cl. & Fin. 908; Hereford *v.* Adams, 7 Ves. 324; Wilkinson *v.* Malin, 2 Cr. & Jer. 636; Att. Gen. *v.* Bovill, 1 Phil. 762; Att. Gen. *v.* Drapers' Co., 2 Beav. 508; Att. Gen. *v.* Coopers' Co., 3 Beav. 29; Thetford School, 8 Rep. 130; Att. Gen. *v.* Skinners' Co., 2 Russ. 407; Mercers' Co. *v.* Att. Gen., 2 Bligh (N. S.), 165; Att. Gen. *v.* Bristol, 2 J. & W. 294; Att. Gen. *v.* South Molton, 14 Beav. 357; 27 Eng. L. & Eq. 17; 5 H. L. Cas. 1; Att. Gen. *v.* Gascoigne, 2 My. & K. 647; Att. Gen. *v.* Cordwainers' Co., 3 My. & K. 534; Att. Gen. *v.* Master of Catherine Hall, Jacob, 381; Att. Gen. *v.* Winson, 6 Jur. (N. S.) 833; Att. Gen. *v.* Christ Church, Jacob, 474; Att. Gen. *v.* Wisbert, 6 Jur. 655; Att. Gen. *v.* Marchant, 12 Jur. 957; L. R. 3 Eq. 424; Att. Gen. *v.* Trinity Church, 9 Allen, 422; Att. Gen. *v.* Fishmongers' Co., 2 Beav. 151; 5 My. & Cr. 11; Att. Gen. *v.* Guise, 2 Vern. 166; Att. Gen. *v.* Baliol Coll., 9 Mod. 407; Att. Gen. *v.* Glasgow Coll., 2 Col. C. C. 665; 1 H. L. Cas. 800; Att. Gen. *v.* Dixie, 2 My. & K. 342; Att. Gen. *v.* Haberdashers' Co., 3 Russ. 530; Merchant Tailors' Co. *v.* Att. Gen., L. R. 11 Eq. 35; Marsh *v.* Renton, 99 Mass. 132; Att. Gen. *v.* Mayor of Beverly, 6 De G., M. & G. 256; 6 H. L. Cas. 310.

<sup>3</sup> Att. Gen. *v.* Wax Chandlers' Co., L. R. 8 Eq. 452; L. R. 5 Ch. 503.

<sup>4</sup> Manchester School Case, L. R. 1 Eq. 55; L. R. 2 Ch. 497; Birkhamstead School Case, L. R. 1 Eq. 102.

supposed private benefit to himself or his own soul, even the prerogative of the crown will not be interposed to apply such a gift to another purpose; but the bequest will fall into the residue.<sup>1</sup> So if it appears, from the construction of the whole instrument, that the gift was for a particular purpose only, and that there was no general charitable intention, the court cannot by construction apply the gift *cy près* the original purpose. If, therefore, it appears that the testator had but one particular object in mind, as to build a church at W., and his purpose cannot be carried out, the gift must go to the next of kin.<sup>2</sup> And if the gift cannot vest in the first instance in the donees, for the reason that no such donees can be found, or because a corporation is dissolved, the court cannot appoint other donees *cy près*.<sup>3</sup>

§ 727. From this review of the law it appears that the object of all the rules upon this subject is to ascertain and carry out, as nearly as may be, the true intention of the donor. As thus explained, the doctrine of *cy près* is only a liberal rule of construction to ascertain intention. (a) The

<sup>1</sup> Cherry v. Mott, 1 My. & Cr. 123; Clark v. Taylor, 1 Dr. 642; Att. Gen. v. Oxford, 1 Bro. Ch. 444, n.; Russell v. Kellett, 3 Sm. & Gif. 264; West v. Shuttleworth, 2 My. & K. 684; Att. Gen. v. Oxford, 4 Ves. 432; Att. Gen. v. Goulding, 2 Bro. Ch. 428.

<sup>2</sup> McAuley v. Wilson, 1 Dev. Ch. 276; Att. Gen. v. Hurst, 2 Cox, 354; Corbyn v. French, 4 Ves. 419; De Garcin v. Lawson, id. 433, cited; De Themmines v. De Bonneval, 5 Russ. 288; Att. Gen. v. Jolly, 2 Strob. 379.

<sup>3</sup> Carter v. Balfour, 19 Ala. 814; Marsh v. Means, 3 Jur. (N. S.) 790; Att. Gen. v. Power, 1 Ball & B. 145; Fisk v. Att. Gen., L. R. 2 Eq. 521.

(a) See *Re St. Stephens*, 39 Ch. D. 364; *Darcy v. Kelley*, 153 Mass. 433; 492; *Hoare v. Hoare*, 56 L. T. 147; *Hayden v. Conn. Hospital*, 64 Conn. 320; *Grand Prairie Seminary v. Ovey*, 29 Ch. D. 560; *White v. Morgan*, 171 Ill. 444; *Adams Female White*, [1893] 2 Ch. 41; *Church of Academy v. Adams*, 65 N. H. 225; *Latter Day Saints v. United States*, Doyle v. Whalen, 87 Maine, 414; 140 U. S. 665; *Young v. Com'rs*, 51 8 Harv. L. Rev. 69; *Women's Ch. F. R.* 585; *Barnard v. Adams*, 58 Ass'n v. Campbell (Mo.), 48 S. W. F. R. 313; *Kelly v. Nichols*, 18 R. I. 960; *Campbell v. Kansas City*, 102 62; *Cary Library v. Bliss*, 151 Mass. Mo. 326. If the object of a chari-

intention of the donor is the point steadily aimed at by all courts. Any arbitrary rule that substitutes the arbitrary conjectures of a court for the intention of the donor would be an outrage in a country governed by established laws; so, of course, any rule that failed to carry out the intention of a donor, when such intention was consistent with the law, would be a defect in the laws, that would require some

table bequest is definite and wholly fails, the bequest cannot be carried out *cy près*. *In re Taylor*, 58 L. T. 538; *Re White's Trust*, 33 Ch. D. 449; *Cunnack v. Edwards*, [1896] 2 Ch. 679. If a charitable purpose is limited to a particular object or to a particular institution, and there is no general intent, then if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, the doctrine of *cy près* does not apply, and, in the absence of any limitation over, or other provision, the legacy lapses. *Teele v. Bishop of Derry*, 168 Mass. 341. The mode of administration or execution is not strictly of the substance of the gift. *Biscoe v. Jackson*, 35 Ch. D. 460. The jurisdiction to act on the *cy près* doctrine upon the failure of a specific charitable bequest arises whether the residue is given to a charity or not, unless a direction can be implied from the will that the bequest, if it fails, should go to the charity. *Mayor of Lyons v. Advocate-General of Bengal*, 1 App. Cas. 91. See *Andrews v. M'Guffog*, 11 App. Cas. 313; *Pocock v. Att. Gen.* 3 Ch. D. 342; *Att. Gen. v. Briggs*, 164 Mass. 561. Under this doctrine the court may order a fund, bequeathed to be expended for a charity abroad, to be paid to a committee resident in the country on their undertaking to apply it to the general purposes of another similar charity in the foreign country designated. *Re Davis's Trusts*, 61 L. T. 430. Upon substantial grounds the court may, from time to time, upon the application of the attorney general, or with his consent, alter the scheme of a charity as settled by its previous decree. *Att. Gen. v. St. John's Hospital*, L. R. 1 Ch. 92; *Re Browne's Hospital v. Stamford*, 60 L. T. 288; see *Re Bradford School of Industry*, [1893] W. N. 60. An unauthorized *cy près* application of charity funds by trustees, though long continued, is no ground of objection to a new authorized application. *Re Campden Charities*, 18 Ch. D. 310; 24 id. 218. See *Re Browne's Hospital v. Stamford*, 60 L. T. 288. If an institution, to which a charitable bequest is made, comes to an end after the testator's death, and before payment of the legacy, there is no lapse, but the legacy, failing to be administered by the crown, will usually be applied to charitable purposes. *In re Slevin*, [1891] 2 Ch. 236; 64 L. T. 311. See *Biscoe v. Jackson*, *supra*; *Pease v. Pattinson*, 32 Ch. D. 154.

remedy. It is proper to say, that the crown, in the exercise of its prerogative, always professes to be governed by the intention of the donor, and where such intention fails, the bequest is allowed to revert to the heir; though it is difficult to understand how an intention to aid a hospital for foundlings could be deduced from a declared intention to build a Jewish synagogue. From a few grotesque cases like this, discredit has been thrown upon the whole doctrine of *cy près*. The difference between the crown and the court is this: the court is governed by known judicial rules of interpretation; the crown is governed by its own good will and pleasure in deducing or imputing such intentions as it sees fit.

§ 728. When the *cy près* doctrine is reduced to its elements, it becomes a very simple judicial rule of construction; and, as such, courts in all the States can and do apply it without usurping any prerogative powers.<sup>1</sup> The same rule may be, and is, applied in a great variety of cases. If a testator makes a gift to trustees in trust to invest the fund in United States bonds and pay the income to his wife, and there are no bonds by reason of the payment of the public debt, would the trust therefore fail and the gift revert to his heirs, or would the court say that the trust for the wife being the principal intention of the bequest, the particular manner of the investment of the funds is incidental, and that, the particular direction of the will having failed, an investment will be ordered *cy près* the original direction of the will?<sup>2</sup> So if a fund is given in trust for a charity, with a direction to accumulate beyond the legal period, or with any other illegal or impossible direction as to the incidental management of the fund, the court will direct a management that is

<sup>1</sup> *Ante*, § 376; *Dickson v. Montgomery*, 1 Swanst. 348; *Jackson v. Phillips*, 14 Allen, 539; *Att. Gen. v. Wallace*, 7 B. Mon. 611; *Philadelphia v. Girard*, 45 Penn. St. 27; *Gilman v. Hamilton*, 16 Ill. 231; *Att. Gen. v. Jolly*, 1 Rich. Eq. 99; 2 Strob. Eq. 395; *Moore v. Moore*, 4 Dana, 366; *Gass v. Wilhite*, 2 Dana, 177; *Curling v. Curling*, 8 Dana, 38. In Pennsylvania, the statute of 1855 now confers full power on the court to act in all cases. *Curtis v. Brown*, 29 Ill. 101.

<sup>2</sup> *Chamberlain v. Brackett*, L. R. 8 Ch. 206, and cases cited.



legal and possible, *cy près* the original direction; and this on the ground that the donor did not intend his charity to fail because one of the incidental directions could not be carried out.<sup>1</sup>

§ 729. With these views in mind, it may now be said that a bequest for charity, generally; or to such persons in trust as shall be named thereafter, and none are named;<sup>2</sup> or if a fund is given for such charitable uses as shall be directed by a codicil or note in writing, and there are no such papers to be found;<sup>3</sup> or if a trust is created in a will for a school to be thereafter named, and none is named;<sup>4</sup> or to the poor generally; or to charity generally with no trustees appointed;<sup>5</sup> or to the advancement of religion;<sup>6</sup> or to such uses as the executor shall appoint, and the executor's appointment is revoked, or the executor renounces probate,<sup>7</sup> or refuses to appoint;<sup>8</sup> or if a gift is made for an object which has no existence,<sup>9</sup> or which is void in law,<sup>10</sup> or is impossible before the

<sup>1</sup> Where the courts have said that the *cy près* doctrine will not prevail in this country, the cases have generally been of such a character that probably the prerogative power rather than the judicial power of construction was intended to be denied. *Methodist Church v. Remington*, 1 Watts, 226; *Whitman v. Lex*, 17 S. & R. 93; *Henry County v. Winnebago, &c.*, 52 Ill. 454; *Grimes v. Harmon*, 35 Ind. 237; *Moore v. Moore*, 4 Dana, 366; *Williams v. Williams*, 4 Selden, 525.

<sup>2</sup> *Mills v. Farmer*, 1 Mer. 55, 96; *Moggridge v. Thackwell*, 7 Ves. 36.

<sup>3</sup> *Ibid.*; *Att. Gen. v. Syderfin*, 1 Vern. 224; 2 Freem. 261; *Cook v. Dunkenfield*, 2 Atk. 56, 567; *Commissioners v. Sullivan*, 1 Dru. & War. 501.

<sup>4</sup> See cases cited in last note.

<sup>5</sup> *Att. Gen. v. Mathews*, 2 Lev. 167; *Finch*, 245; *Att. Gen. v. Rance*, Amb. 422; *Clifford v. Francis*, Freem. 330; *Att. Gen. v. Herrick*, Amb. 712.

<sup>6</sup> *Powerscourt v. Powerscourt*, 1 Mol. 616.

<sup>7</sup> *White v. White*, 1 Bro. Ch. 12; *Att. Gen. v. Fletcher*, 5 L. J. (N. S.) Ch. 75.

<sup>8</sup> *Att. Gen. v. Boulton*, 2 Ves. Jr. 380; 3 Ves. 220.

<sup>9</sup> *Att. Gen. v. London*, 3 Bro. Ch. 171; 1 Ves. Jr. 143; *Loscombe v. Winteringham*, 13 Beav. 87; *Att. Gen. v. Oglander*, 1 Bro. Ch. 166.

<sup>10</sup> *Att. Gen. v. Whorwood*, 1 Ves. 534; *Da Costa v. De Pas*, Amb. 228; *Att. Gen. v. Vint*, 3 De G. & Sm. 704; *Cary v. Abbott*, 7 Ves. 490; *Att. Gen. v. Goulding*, 2 Bro. Ch. 428.

administration of the charity begins;<sup>1</sup> or giving to an uncertain charity; or to trustees who refuse to accept and exercise the discretion, and there is no authority in the successors to exercise the power;<sup>2</sup> or to a particular charity by a description so uncertain that it is wholly uncertain what charity is intended;<sup>3</sup> or where the sums or the charities are wholly uncertain,<sup>4</sup>—in all these cases, courts in America could not interfere to establish the charities, appoint trustees, or decree a scheme by which the funds should be expended. Some prerogative power is necessary to give effect to such inchoate, imperfect, or illegal bequests. Courts in England do not profess to administer them in their judicial capacity,<sup>5</sup> and the courts in America, with a few exceptions, have declined to act in such cases.<sup>6</sup> (a)

<sup>1</sup> Att. Gen. v. Guise, 2 Vern. 266; Heyter v. Trego, 5 Russ. 113; Att. Gen. v. Ironmongers' Co., Cr. & Ph. 208; 10 Cl. & Fin. 908; Att. Gen. v. Glyn, 12 Sim. 84; Martin v. Margham, 14 Sim. 230; Incorporated Soc. v. Price, 1 J. & Lat. 498.

<sup>2</sup> Att. Gen. v. Andrew, 3 Ves. Jr. 633; Denyer v. Druce, Taml. 32; Reeve v. Att. Gen., 3 Hare, 191; Fountain v. Ravenel, 17 How. 382; Att. Gen. v. Jackson, 11 Ves. 365.

<sup>3</sup> Simon v. Barker, 5 Russ. 112; Bennet v. Hayter, 2 Beav. 81.

<sup>4</sup> Pieschel v. Paris, 2 S. & S. 384; Hartshorne v. Nicholson, 26 Beav. 58.

<sup>5</sup> 1 Jarman on Wills, p. 224 (ed. 1861).

<sup>6</sup> Grimes v. Harmon, 35 Ind. 198.

(a) In New York the *cy près* doctrine is not accepted, and charitable gifts are, by the decisions, invalid when the beneficiary is not certain. Tilden v. Green, 130 N. Y. 29; 27 Am. St. Rep. 487, and note; Greene v. Greene, 125 N. Y. 506; People v. Powers, 147 N. Y. 104, 109, 115; Fairchild v. Edson, 154 N. Y. 199; see Hayes v. Pratt, 147 U. S. 557; Booth v. Baptist Church, 126 N. Y. 215; Simmons v. Burrell, 28 N. Y. S. 625; Butler v. Trustees, 36 id. 562; First Nat. Bank v. Miller, 49 id. 981; Wilcox v. Gilchrist, 85

Hun, 1; Butler v. Trustees, 92 Hun, 96; 5 Harv. L. Rev. 389; 26 Am. L. Rev. 905; 31 Am. L. Reg. N. S. 75, 123, 235, 249, 522. Also in Wisconsin and Tennessee, the doctrine of *cy près* is not recognized. Fuller's Will, 75 Wis. 431; McHugh v. McCole, 97 Wis. 166; Johnson v. Johnson, 92 Tenn. 559, 566. In these States, also, and in Maryland, Alabama, and Texas, a beneficiary must be certainly designated, who is capable to enforce the trust. Ibid.; Trustees v. Jackson Square Church, 84 Md. 173; Fes-

§ 730. It is well settled, that a devise for a charitable use to church-wardens, although not a corporation capable in law of holding and transmitting property, will be sustained;<sup>1</sup> so to an institution neither established nor incorporated in the life of the donor;<sup>2</sup> and so a devise to certain officers or their successors in office, or, if they are incapable of executing the trust, then to a corporation to be formed for the purpose, was held by the Supreme Court of the United States, to be a good devise and capable of being carried into effect.<sup>3</sup> (a) A gift to a corporation by a misnomer is good for

<sup>1</sup> Att. Gen. v. Oglander, 3 Bro. Ch. 166; Att. Gen. v. Green, 2 Bro. Ch. 492; Att. Gen. v. Boulton, 2 Ves. Jr. 380; Frier v. Peacock, Finch, 245; Duke, 355; Att. Gen. v. Wansay, 15 Ves. 232; Burrill v. Boardman, 43 N. Y. 254.

<sup>2</sup> Russell v. Allen, 107 U. S. 163.

<sup>3</sup> Inglis v. Sailors' Snug Harbor, 3 Pet. 99; White v. White, 1 Bro. Ch. 12; Att. Gen. v. Downing, Amb. 550; Att. Gen. v. Bowyer, 3 Ves. 714.

torazzi v. St. Joseph's Cath. Church, 104 Ala. 327; Heidenheimer v. Bauman, 84 Texas, 174; see Domestic & F. Mis. Society v. Gaither, 62 F. R. 422. In New York the rule in Tilden v. Green was changed by the statute of 1893, ch. 701, which does not fully adopt the *cy près* doctrine, but relieves gifts to charities when the beneficiaries are uncertain. See Allen v. Stevens, 49 N. Y. S. 431; Dammert v. Osborn, 140 N. Y. 30, 43. In Massachusetts, a simple gift to an institution which in its nature, and by its name, appears to be a mere trustee or conduit for the application of its funds to charitable purposes, will not fail upon failure of the donee. Stratton v. Physio-Medical College, 149 Mass. 505.

A promise to make a gift to a charity is not binding when there is no consideration therefor; and this applies to subscriptions when

the promisee has not incurred liability in reliance thereon. Cottage St. M. E. Church v. Kendall, 121 Mass. 528; Twenty-Third St. B. Church v. Cornell, 117 N. Y. 601. Montpelier Seminary v. Smith's Estate, 69 Vt. 382; O'Brien v. McMeel, [1898] 1 I. R. 366. As to the liability of religious societies and charitable institutions for negligence causing personal injuries, see Donnelly v. Boston Cath. Cem. Ass'n, 146 Mass. 163; Chapin v. Holyoke Young Men's Ch. Ass'n, 165 Mass. 280; Downes v. Harper Hospital, 101 Mich. 555; 28 Am. L. Reg. (N. S.) 669; 29 id. 209.

(a) One charity may lawfully be limited upon another in case the first fails. Christ Church v. Trustees, 67 Conn. 554.

In New York a gift to an unincorporated charitable institution is void. Pratt v. Roman Cath. Or-

a charitable purpose, if the corporation can be identified;<sup>1</sup> gifts in trust to voluntary associations for charitable purposes have been upheld;<sup>2</sup> and so have gifts to churches, societies, conferences, yearly meetings of Friends, and families of Shakers, and other organizations.<sup>3</sup> These bodies, or *quasi* corporations, have been considered so far under the

<sup>1</sup> *Tucker v. Seamen's Aid Soc.*, 7 Met. 188; *Winslow v. Cummings*, 3 Cush. 359; *Minot v. Boston Asylum*, 7 Met. 417; *Anon.*, 1 Ch. Cas. 267; *Att. Gen. v. Platt, Finch*, 221; *Hornbeck v. American Bible Soc.*, 2 Sandf. Ch. 183; *Chapin v. School Dis.*, 35 N. H. 445; *Tappan v. Deblois*, 45 Me. 122.

<sup>2</sup> *Duke v. Fuller*, 9 N. H. 535; *Volgen v. Yates*, 2 Barb. Ch. 290; *Burr v. Smith*, 7 Vt. 241; *Antones v. Eslava*, 9 Porter, 527; *Washburn v. Sewell*, 9 Met. 280; *Zeisweiss v. James*, 63 Penn. St. 465; *Roshi's App.*, 69 Penn. St. 462. But see *White v. Hale*, 2 Cold. 77; *German, &c. Association*, 10 Minn. 337; and *Grimes v. Harmon*, 35 Ind. 198.

<sup>3</sup> *Magill v. Brown*, Brightly, 347; *Shotwell v. Mott*, 2 Sandf. Ch. 46; *Pickering v. Shotwell*, 10 Penn. St. 23; *Wright v. Linn*, 9 id. 433; *Beaver v. Filsom*, 8 id. 327; *Wright v. Methodist Church*, 1 Hoff. Ch. 202; *Hendrickson v. Decow, Saxt.* 577; *Att. Gen. v. Jolly*, 1 Rich. Eq. 99; 2 Strob. Eq. 379; *White v. Att. Gen.*, 4 Ired. Eq. 19; *Banks v. Phelan*, 4 Barb. 80; *Williams v. Pearson*, 38 Ala. 299; *Missionary Soc.*, 30 Penn. St. 425; *Price v. Maxwell*, 28 id. 23; *Evangelical Assoc.*, 35 id. 316; *Preachers' Aid Soc. v. Rich*, 45 Maine, 552; *Gass v. Wilhite*, 2 Dana, 170.

phan Asylum, 46 N. Y. S. 1035. A voluntary association for the help and advancement of the members only is not a charity. *Cunnack v. Edwards*, [1896] 2 Ch. 679; *In re Buck*, id. 727; *Coe v. Washington Mills*, 149 Mass. 543. So of an unincorporated, uncertain, and changing body such as a branch of the Salvation Army. *Lane v. Eaton*, 69 Minn. 141. If not more fluctuating than any church membership, the gift may be good, as to the "Christian Brethren." *In re Brown*, [1898] 1 I. R. 423. See *Guilfoil v. Arthur*, 158 Ill. 600; *Jones v. Green (Tenn.)*, 36 S. W. 729.

In Massachusetts and South

Carolina, a religious society, though not incorporated, is a public, charitable institution. *Young Men's Society v. Fall River*, 160 Mass. 409; *Congr'l Uni. Society v. Hale*, 51 N. Y. S. 704; *Dye v. Beaver Creek Church*, 48 S. C. 444; see *Bridges v. Pleasants (N. C.)*, 44 Am. Dec. 94, and note. In Wisconsin, the fact that a religious society was not incorporated when a deed made to its trustees was delivered does not invalidate the trust. *Fadness v. Braunborg*, 73 Wis. 257.

A conveyance to unnamed "trustees" of a corporation may pass title to the corporation. *Keith & P. Coal Co. v. Bingham*, 97 Mo. 196.

control of a court of equity that they would be compelled to execute the duties of the trust imposed upon them, and could be dealt with for a breach.<sup>1</sup> But a gift to a corporation that may not be incorporated within the time limited for the vesting of estates, or to a corporation to come into existence that cannot be incorporated under the laws of a State, will fail.<sup>2</sup> Property given to trustees for voluntary religious societies does not vest in new trustees who may be elected from time to time, but remains in the old trustees until they make a conveyance.<sup>3</sup>

§ 731. If a testator creates a trust for a particular charitable purpose, as for a school, hospital, almshouse, church, or other institution, and points out all the details, so that there is certainty in the purposes and objects of the charity, and appoints no trustees, or if the trustees fail for any reason, courts will appoint other trustees, for such is the plain intention of the donor; and it is a maxim of courts never to allow a certain and valid trust to fail for want of a trustee.<sup>4</sup> In such cases, the courts say that there is no ground to suppose that the discretion of any particular trustee has anything to do with the essence of the gift.<sup>5</sup> Again, if a testator makes a bequest for a charitable use in the most general and indefinite terms, and appoints trustees to exercise their discretion in selecting the objects and in reducing

<sup>1</sup> *Hubbard v. German Cath. Cong.*, 34 Iowa, 31; *Worrell v. Presbyterian Church*, 23 N. J. Eq. 96.

<sup>2</sup> *Zeisweiss v. James*, 63 Penn. St. 465.

<sup>3</sup> *Peabody v. Eastern Meth. Soc.*, 5 Allen, 540.

<sup>4</sup> Sections 38, 45, 240, 248, 427; *Treat's App.*, 30 Conn. 113; *White v. Hampton*, 13 Iowa, 259.

<sup>5</sup> *Inglis v. Sailors' Snug Harbor*, 3 Peters, 99; *Reeve v. Att. Gen.*, 3 Hare, 191; *Hayter v. Trego*, 5 Russ. 113; *Denyer v. Druce*, Taml. 32; *Soc. for the Prop. of Gos. v. Att. Gen.*, 3 Russ. 142; *Walsh v. Gladstone*, 1 Phil. Ch. 290. Where a testator directed his trustees to pay the income of a fund to the committee of a certain school society (that being a kind of school district) for the benefit of poor children, and the legislature having abolished school societies, it was held, that the charity still remained to be administered in some other form. *Berchard v. Scott*, 39 Conn. 68.

the general intent to a particular and practical application, and such trustees fail for any reason, without having exercised their discretion or power of appointment in reducing the general and indefinite charity to a practical certainty of administration, courts will be governed by the intention of the donor, in determining whether they will appoint other trustees to exercise the power given to the first trustees named in the will. If the power given to the first trustees is a personal trust and confidence, the court should not appoint other trustees to exercise that power contrary to the intention of the donor; but the court ought to act upon liberal principles of construction in finding such intention.<sup>1</sup> If a testator makes a general and indefinite bequest to charity, or to the poor, or to religion, and appoints no trustee, but plainly refers such appointment to the court, there would seem to be no impropriety in the court appointing a trustee, according to the plain intent of the donor, leaving such trustee to find his power in the will of the donor. But if a testator makes a vague and indefinite gift to charity, and names no trustee, and gives no power to the court to appoint, there is no power in the American courts to administer such an inchoate and imperfect gift.<sup>2</sup>

<sup>1</sup> *Ante*, § 721; *Lorings v. Marsh*, 6 Wall. 337; *Att. Gen. v. Gladstone*, 13 Sim. 7; *Fontain v. Ravenel*, 17 How. 382; *Down v. Warrall*, 1 My. & K. 561; *Green v. Allen*, 5 Humph. 170; *Griffin v. Graham*, 1 Hawks, 96.

<sup>2</sup> In 2 Redf. on Wills, pp. 517, 518, 535 (2d ed.), it is asserted that the American courts exercise the ordinary chancery jurisdiction of the court of chancery in England, and also the prerogative power of the crown; that they carry into effect trusts where there is great indefiniteness in the objects, and that "the want of a trustee in such cases is never any obstacle in the way of a court carrying into effect any trust, and more especially one of a charitable character." In support of these assertions, *Whitman v. Lex*, 17 S. & R. 88; *Moore v. Moore*, 4 Dana, 354; *McGirr v. Aaron*, 1 Pa. 49; *Methodist Church v. Remington*, 1 Watts, 218; *Morrison v. Beirer*, 2 Watts & S. 81; *Zimmerman v. Anders*, 6 Watts & S. 218; *Pickering v. Shotwell*, 10 Penn. St. 23; *State v. Girard*, 2 Ired. Eq. 210; *Antones v. Eslava*, 9 Porter, 527; *Dickson v. Montgomery*, 1 Swanst. 348; *Zanesville C. & M. Co. v. Zanesville*, 20 Ohio, 483; *Att. Gen. v. Jolly*, 1 Rich. Eq. 99, are cited. It may be said, in regard to these statements and these authorities, that no court in America has ever supposed that it was exercising anything more than its ordinary equity power, or that

§ 732. The rule of certainty applying to trusts in general<sup>1</sup> does not affect gifts for charity, which will be upheld though expressed with much vagueness. But, in order to bring the case within this exception the language employed must require the fund to be expended in some charity; it must not be left in the discretion of the trustee to spend the money for a charitable or a non-charitable purpose. The devotion of the fund to charity must be clear and certain.<sup>2</sup> It is immaterial how uncertain, indefinite, and vague the *cestuis que trust* or final beneficiaries of a charitable trust are, provided there is a legal mode of rendering them certain by means of trustees appointed or to be appointed. In other words, it is immaterial how uncertain the beneficiaries or objects are, if the court, by a true construction of the instrument, has power to appoint trustees to exercise the discretion or power of making the beneficiaries as certain as the nature of the trust requires them to be.<sup>3</sup> Uncertainty as to the individual beneficiaries is characteristic of a charitable use.<sup>4</sup>(a) If the class from which the selection is to be made is limited so

it possessed, or could exercise, any arbitrary or prerogative power of the crown of England, unless such power had been expressly conferred upon it by the legislature. It may be further said, that, if courts have appointed trustees to carry into effect trusts that were indefinite and vague, they have done so in pursuance of what they supposed to be the intention of the donors, arrived at by a liberal construction of the wills or deeds. If any cases are not within this proposition, they probably would not be followed by courts that have no power to exercise any jurisdiction not of a judicial character. In 1855 the legislature of Pennsylvania conferred upon their courts the *cy près* power of the English chancery, so that thereafter no property given to religious, charitable, literary, or scientific uses, should ever revert to the heir. *Purd. Dig.* 145; *Miller v. Porter*, 53 Penn. St. 297.

<sup>1</sup> § 83.

<sup>2</sup> *Taylor v. Keep*, 2 Brad. (Ill.) 368; see *Mills v. Newbury*, 112 Ill. 123.

<sup>3</sup> *McLain v. School Directors*, 51 Penn. St. 196; *Zeisweiss v. James*, 63 id. 465; *Miller v. Atkinson*, 63 N. C. 537; *Beckwith v. St. Philip's Parish*, 69 Ga. 564.

<sup>4</sup> *State v. Griffith*, 2 Del. Ch. 392.

(a) A gift for the aid or benefit not a charity. *Bullard v. Chandler*, of defined persons is a trust and 149 Mass. 532, 540.

that the court can distribute or enforce the trust in case the trustee refuses to act, that is the most that is ever required. For example, a library gift for the benefit of the people of any city in the State is good.<sup>1</sup> A gift to trustees to educate six orphan boys, to be selected and put to school by them, is uncertain, as the boys are uncertain until they are selected. To say that such a trust should not be executed, but that the heir should take the fund, because there is no orphan boy in the world that can come into court and claim the bequest, would be to subvert the foundation of all public charity. In all such cases, the heir or other person interested may bring his bill to test the legality of the charity, or the trustees may bring their bill for instruction, or the attorney general may bring a bill or information to establish the trust; and the court, on such bills, can pass upon the validity of the bequest as a charitable use.<sup>2</sup> If, after the charity is established and is in process of administration, there is any abuse of the trust or misemployment of the funds, and there are no individuals having the right to come into court and maintain a bill, the attorney general, representing the sovereign power and the general public, may bring the subject before the court by bill or information, and obtain perfect redress for all abuses.<sup>3</sup> But where a gift is not a public charity, but is to a school that is not free and open to the general public, the attorney general cannot maintain an information or bill.<sup>4</sup> (a)

<sup>1</sup> *Cottman v. Grace*, 41 Hun, 345; *Ireland v. Geraghty*, 11 Biss. (U. S.) 465.

<sup>2</sup> *Burrill v. Boardman*, 43 N. Y. 254.

<sup>3</sup> *Att. Gen. v. Garrison*, 101 Mass. 223; *Wellbeloved v. Jones*, 1 S. & S. 40; *Ludlow v. Greenhouse*, 1 Bligh (N. S.), 17; *Lewin on Trusts*, 665-674; *Parker v. May*, 5 Cush. 341.

<sup>4</sup> *Att. Gen. v. Heiner*, 2 Vern. 387; *Liley v. Hey*, 1 Hare, 150; *Wellbeloved v. Jones*, 1 S. & S. 40; *Att. Gen. v. Smart*, 1 Ves. 72; *Att. Gen. v. Jeanes*, 1 Atk. 355; *Att. Gen. v. Whiteley*, 11 Ves. 241; *Att. Gen. v. Parker*, 1 Ves. 43; 2 Atk. 576; *Att. Gen. v. Whorwood*, 1 Ves. 534; *Att. Gen. v. Brereton*, 2 Ves. 426; *Att. Gen. v. Middleton*, id. 328; *Mavor v. Nixon*, 2 Y. & Jer. 60.

(a) An information is not, it administrations in office by trustees or executors. *People v. Simon-*



So if there is a gift or dedication of land for a church or meeting-house, to be owned by the church, parish, society, or by pew-holders who have vested rights and can sue, the attorney general cannot sue in his official capacity, unless the gift is so public and indefinite that no individuals or corporations have the right to come into court for redress. Suits to regulate such trusts must be brought by the parties interested.<sup>1</sup> The church edifices of this country stand in a peculiar position. They are not free, open churches, as those words are used in describing a public charity. They are owned by societies, parishes, churches, trustees, or pew-holders, and can be controlled by these bodies as corporations or *quasi* corporations, and directed to such uses as they see fit; for these reasons the funds given or contributed to build these edifices and keep them in repair are not funds given for public charitable uses in the legal sense; consequently

<sup>1</sup> Att. Gen. *v.* Merrimack Manufacturing Co., 14 Gray, 586; Att. Gen. *v.* Federal St. Meeting-House, 3 Gray, 1.

son, 126 N. Y. 299. When trustees of a charity are appointed by the donor, and are not abusing their trust, the attorney general is not a necessary party to a suit in equity for the construction of the will. *Newberry v. Blatchford*, 106 Ill. 584. The relator in an information to enforce a charitable trust must pay the costs if his case discloses no merits. *Strickland v. Weldon*, 28 Ch. D. 426; Att. Gen. *v. Butler*, 123 Mass. 504; *Burbank v. Burbank*, 152 Mass. 254; see *Davis v. Barnstable*, 154 Mass. 224; Att. Gen. *v. Clark*, 167 Mass. 201. If there is no case for the public, the relator cannot have the information retained as a bill. Att. Gen. *v. Evart Booming Co.*, 34 Mich. 462; *Wilson v. Shively*, 10 Oregon, 267, 276; see *Thompson v. Thompson*, 6

*Houst. (Del.)* 225. If there is no private right or special damage, the sanction of the attorney general is necessary, and the suit must be treated as in the nature of an information. *Wallasey Local Board v. Gracey*, 36 Ch. D. 593; *London Association v. London & India Docks Joint Committee*, [1892] 3 Ch. 242. The attorney general, after assenting to the use of the State's name in an information in which the relator's interest preponderates, does not control the suit and cannot withdraw such assent to the relator's prejudice during its pendency. *People v. North San Francisco Homestead Ass.*, 38 Cal. 564; *People v. Clark*, 72 Cal. 289; see *Hesing v. Att. Gen.*, 104 Ill. 292.

the attorney general can seldom maintain an information for any alleged misuse or pretended perversion of these church edifices.<sup>1</sup> But if property is in the hands of trustees of a church or religious society, in such manner that it is a charitable trust or otherwise, the trustees must manage the property according to the usages of the society, and courts of equity can interfere to prevent abuses and to preserve the use of the property in the accustomed channel.<sup>2</sup>

§ 733. As a charitable use cannot be changed from the purposes declared by the donor, so long as there are any objects of such charity, or so long as it can be applied to the purposes named, and the courts, where the objects fail, construe the instrument creating the trust, to discover the charitable purpose of the donor, *cy près* the original purpose;<sup>3</sup> so a charitable gift must be accepted upon the same terms upon which it is given;<sup>4</sup> and the trustees, whether individuals or corporations, cannot convert the fund to other uses, so long as the uses declared by the donor are capable of execution.<sup>5</sup> Nor can any agreement or concurrence among the beneficiaries avail to divert a fund given for a particular and possible purpose.<sup>6</sup> Thus if the gift is to provide a preacher in Dale, it would be a breach of trust to provide one in Sale; or if it is to provide a preacher, it cannot be given to the poor;<sup>7</sup> or if it is for the poor of one parish, it cannot be

<sup>1</sup> Ibid.; Dublin Case, 38 N. H. 459.

<sup>2</sup> Brunnenmayer v. Buhre, 32 Ill. 183; German, &c. Congregation v. Repler, 17 La. An. 127.

<sup>3</sup> See §§ 724-728.

<sup>4</sup> Gilman v. Hamilton, 16 Ill. 225; Silcox v. Harper, 32 Ga. 639.

<sup>5</sup> Att. Gen. v. Rochester, 5 De G., M. & G. 797; Att. Gen. v. Sherborne School, 18 Beav. 256; Att. Gen. v. Gould, 28 Beav. 485; Ward v. Hipwell, 3 Gif. 547; Att. Gen. v. Calvert, 23 Beav. 248; *In re* Stafford Charities, 25 Beav. 28; Att. Gen. v. Bourcherett, id. 116; Att. Gen. v. Platt, Finch, 221; Margaret v. Regius Professors in Cambridge, 1 Vern. 55; Mann v. Ballott, id. 43; 1 Eq. Cas. Ab. 99; Att. Gen. v. Gleg, 1 Atk. 356; Amb. 373.

<sup>6</sup> McRoberts v. Moudy, 19 Mo. App. 26.

<sup>7</sup> Att. Gen. v. Newbury Cor., C. P. Cooper (1837, 1838), 72; Att. Gen. v. Goldsmiths' Co. (id.) 292; Duke, 94, 116.

extended to other parishes;<sup>1</sup> or if to repair a chapel, it cannot be mixed up with parochial funds or the poor-rates;<sup>2</sup> or if for erecting a hospital, it cannot be used for municipal purposes;<sup>3</sup> or if it is to support the preaching of a particular religious doctrine, it is a breach of trust to support the preaching of any other doctrine, though the difference is very slight.<sup>4</sup> And generally a charitable donation for religious purposes must be applied to sustain the purposes and doctrines of the donor, as indicated by him; and if the donor has not clearly stated the doctrines he intends to favor, courts will inquire into the doctrines held by him, and, when ascertained, will presume them to be the doctrines intended to be taught under the trust.<sup>5</sup> If there occurs a schism in the church or body to which the trust is given, the funds generally follow the old organization, unless it has made a material departure from the faith of the original founder.<sup>6</sup> If the charter or organization of a church defines its relations and purposes, and determines the rules and regulations under which it must act, or, in other words, establishes a

<sup>1</sup> Att. Gen. *v.* Brandreth, 1 Yo. & Col. Ch. 200.

<sup>2</sup> Att. Gen. *v.* Vivian, 1 Russ. 226-337; Att. Gen. *v.* Mansfield, 2 Russ. 501; *Ex parte* Greenhouse, 1 Madd. 92; 1 Bligh (N. s.), 17.

<sup>3</sup> Att. Gen. *v.* Kell, 2 Beav. 575; Att. Gen. *v.* Exeter, 2 Russ. 45; 3 Russ. 395; Att. Gen. *v.* Wilkinson, 1 Beav. 372; Att. Gen. *v.* Bovill, 1 Phil. 762; Att. Gen. *v.* Blizard, 2 Beav. 233.

<sup>4</sup> Combe *v.* Brazier, 2 Des. 431.

<sup>5</sup> Shore *v.* Wilson, 9 Cl. & Fin. 355; Att. Gen. *v.* Shore, 11 Sim. 592; Att. Gen. *v.* Pearson, 3 Mer. 353; Earle *v.* Wood, 8 Cush. 430; Dublin Case, 38 N. H. 459; Combe *v.* Brazier, 2 Des. 431; App. *v.* Lutheran Congregation, 6 Penn. St. 201; Robertson *v.* Bullions, 1 Kern. 243; Att. Gen. *v.* Drummond, 1 Dr. & War. 353; Winebrenner *v.* Colder, 43 Penn. St. 244; Kniskern *v.* Lutheran Churches, 1 Sand. Ch. 439; Miller *v.* Gable, 2 Denio, 492; Princeton *v.* Adams, 10 Cush. 129; Att. Gen. *v.* Moore, 19 N. J. Eq. 503; Att. Gen. *v.* Bunce, L. R. 6 Eq. 563; Att. Gen. *v.* Glasgow Coll., 2 Coll. Ch. 665; Potter *v.* Thornton, 7 R. I. 252; Att. Gen. *v.* Murdoch, 7 Hare, 445; 1 De G., M. & G. 86.

<sup>6</sup> Ibid.; Hendrickson *v.* Decow, Saxton, 577; Earle *v.* Wood, 8 Cush. 430; Rosh's App., 69 Penn. St. 462; Godfrey *v.* Walker, 42 Ga. 562; Bouldin *v.* Alexander, 14 Wall. 132; McBride *v.* Porter, 17 Iowa, 203. But see *Ferraria v. Vasconcellos*, 31 Ill. 25; *First Constitutional Presbyterian Church v. Congregational Soc.*, 23 Iowa, 567.

constitution to regulate and limit its action, that body which acts according to its constitution will be the regular church, and entitled to the church property, whether it may be a majority or minority of the whole number of the whole church.<sup>1</sup> Equity will not interfere unless there is a substantial abuse or misuser of the funds, which amounts to a perversion of the charity.<sup>2</sup> A mere change of ecclesiastical relations is not necessarily a perversion of the trust.<sup>3</sup> But trustees to hold church property for a church according to the usages of a church may be enjoined from letting it for school purposes.<sup>4</sup> A gift to a religious society, or to a charitable or educational institution, will be presumed to be a charitable gift, though no purposes are named, and such societies will be presumed to hold such gifts in trust for those religious and charitable purposes for which they exist.<sup>5</sup> Where there are numerous contributors to a charitable fund, the declaration of one of the contributors, long acted upon, will be taken *prima facie* as a declaration of the purposes of the trust.<sup>6</sup> In such case the contributors to the fund cannot maintain a bill to correct an abuse of the fund by the trustees, unless they are also the *cestuis que trust*.<sup>7</sup>

§ 734. The proposition that charities must be accepted upon the terms upon which they are given, and that they cannot be altered by any new agreement between the heir of the donor, the trustees, beneficiaries, or any other parties

<sup>1</sup> Swarr's App., 67 Penn. St. 146.

<sup>2</sup> Happy v. Morton, 33 Ill. 398.

<sup>3</sup> Swedesborough Church v. Shivers, 1 Green, Ch. 453; Lutheran Cong. v. St. Michael's Church, 48 Penn. St. 20.

<sup>4</sup> Perry v. McEwen, 12 Ind. 440.

<sup>5</sup> Incorporated Soc. v. Richards, 1 Dru. & W. 294; Evangelical Assoc. App., 35 Penn. St. 316; Att. Gen. v. Pearson, 7 Sim. 290; 3 Mer. 409; Re Ilminster School, 2 De G. & J. 535; 8 H. L. Cas. 495; Re Stafford Char., 25 Beav. 28; Att. Gen. v. Clifton, 32 Beav. 596; Everett v. Carr, 59 Maine, 333.

<sup>6</sup> Att. Gen. v. Clapham, 4 De G., M. & G. 626; Newmyer's App., 72 Penn. St. 121.

<sup>7</sup> Ludlam v. High, 3 Stockt. 342.

thereto, is confined to charities established by the gift and bounty of some donor for a particular faith;<sup>1</sup> for if a religious society is endowed with funds by a donor for its general purposes, or if such society creates a fund by contribution thereto by its individual members, although such funds are charitable, yet such society may by agreement alter its faith and practice, and still retain its funds with which to teach its new faith.<sup>2</sup> So it has been held that a use for forty years will establish the right to appropriate the funds to an altered faith.<sup>3</sup> So where it cannot be discovered from documents what particular form of worship was intended to be established by the charity, long-continued usage by the congregation will be received as evidence of the original intent.<sup>4</sup> But if the original purpose of the donor is perfectly clear, the court cannot change the trust, although the congregation may have followed a different practice: the majority cannot say we have changed our opinions, and the fund shall hereafter be for the benefit of people of our faith and form of worship.<sup>5</sup> If the trustee is a corporation, having power to make *by-laws*, this franchise will not extend so far as to

<sup>1</sup> Att. Gen. *v.* Munro, 2 De G. & Sm. 163; Field *v.* Field, 9 Wend. 394; Miller *v.* Gable, 2 Denio, 525; People *v.* Steele, 2 Barb. 397; Craigdallie *v.* Aikman, 1 Dow, 1; 2 Bligh, 529; Milligan *v.* Mitchell, 3 My. & Cr. 72.

<sup>2</sup> Att. Gen. *v.* Prop. Federal St. Meeting-House, 3 Gray, 61; Dublin Case, 38 N. H. 459; Brendle *v.* German Ref. Cong., 33 Pa. St. 418; Att. Gen. *v.* Clergy Soc., 8 Rich. Eq. 190; Brent *v.* Sandwich, 9 Mass. 289; Avery *v.* Tyringham, 3 Mass. 182; Sheldon *v.* Easton, 24 Pick. 287; Hollis St. Meeting-House *v.* Pierpont, 7 Met. 499; Brown *v.* Lutheran Church, 23 Pa. St. 498.

<sup>3</sup> Att. Gen. *v.* Federal St. Meeting-House, 3 Gray, 64.

<sup>4</sup> Att. Gen. *v.* Hutton, 1 Dru. 530; Stat. 7 and 8 Vict. c. 45, § 2, fixes twenty-five years.

<sup>5</sup> Att. Gen. *v.* Munro, 2 De G. & Sm. 122; Milligan *v.* Mitchell, 3 M. & C. 73; Foley *v.* Wontner, 2 J. & W. 247; Craigdallie *v.* Aikman, 1 Dow, P. C. 1; Broom *v.* Summers, 11 Sim. 357; Att. Gen. *v.* Murdoch, 7 Hare, 445; 1 De G., M. & G. 86; Att. Gen. *v.* Rochester, 5 De G., M. & G. 797; Meeting Street Bap. Soc. *v.* Hail, 8 R. I. 241; Howe *v.* School District, 43 Vt. 282.

enable it to pervert the charity.<sup>1</sup> If the deed of investment contains a clause, authorizing a majority of trustees to make rules and orders from time to time when they think proper, such clause will not authorize the trustees to change the objects of the charity, or the doctrines to be promulgated.<sup>2</sup>

§ 735. Nor can the trustees, whether persons or corporations, appointed to administer a charity, be changed by the agreement of the parties, nor for mere convenience; as where funds were given to Harvard College by various donors for the purpose of promoting education at the college, by a school to be a branch of the university, the court held that the funds could not be withdrawn from the corporation of Harvard College, and intrusted to an independent board of trustees, to be applied to the support of a divinity school not connected with the college, although such separation would be convenient for all parties, and would produce greater vigor and efficiency in the administration of the funds. The court decided that the funds had been given to Harvard College as a known institution, and upon a personal trust and confidence; that the constitution of a charity could not be changed for reasons of mere expediency; and that a court of equity cannot remove trustees and appoint others, except for incapacity, unfaithfulness, or failure to perform their duties.<sup>3</sup> If a trustee is known to hold such opinions in relation to the trust as it is ordered to be administered by the court, that he cannot be expected cordially and faithfully to execute it, he may be removed and a proper person appointed.<sup>4</sup> If trustees who are to administer a trust cease, for any reason, to be subject to the jurisdiction of the court having jurisdiction over the charity, such trustees may be re-

<sup>1</sup> *Eden v. Foster*, 2 P. Wms. 327; *Field v. Girard College*, 54 Penn. St. 233.

<sup>2</sup> *Att. Gen. v. Pearson*, 3 Mer. 411.

<sup>3</sup> *Harvard College v. Soc. for Prom. Theo. Education*, 3 Gray, 280; *Att. Gen. v. Hartley*, 2 J. & W. 382; *Att. Gen. v. Mansfield*, 2 Russ. 520; *Stone v. Framingham*, 109 Mass. 303.

<sup>4</sup> *Att. Gen. v. Garrison*, 101 Mass. 223.

moved.<sup>1</sup> If the trustees, by a mistake, select or appoint the objects of a charity, courts will not remove the persons so appointed, if the trustees made the choice in good faith and without fraud or corruption.<sup>2</sup>

§ 735 *a*. Although the statute of uses as declared in 27 Hen. VIII. was clearly intended to destroy uses and trusts altogether, the courts have refused to carry out that intention on various grounds, and one of the exceptions made relates to charitable uses. In the case of a deed to A. for the use of the Protestant Episcopal church of X., the statute does not execute the use. One reason given is that in charitable uses the beneficiaries are uncertain, and there is no one in whom the use can be executed.<sup>3</sup>

§ 736. Another particular in which charitable gifts are favored by the law is that such gifts are not obnoxious to the common rule against perpetuities.<sup>4</sup> (*a*) For public convenience, the ownership of property cannot be suspended for a long time, nor will public policy allow property to be inalienable beyond a certain period. Thus if a testator gives land to his heir upon condition that he shall not alienate the same, the condition is void as against public policy: but a testator, by certain forms of gift, may tie up his property for a life or lives in being, and twenty-one years and nine months; as, if he gives land to be enjoyed by a certain person during such person's life, and then to some other person or purpose for twenty-one years and nine months, and then in fee to some person or persons who will at that time answer a particular description. In reference to the last form of gift, it will be seen that such land cannot be sold and a title

<sup>1</sup> Att. Gen. *v.* City of London, 1 Ves. Jr. 243. And see Provost of Edinburgh *v.* Aubery, Amb. 236.

<sup>2</sup> *Re* Story's University Gift, 2 De G., F. & J. 529, 531, 540. But see *In re* Nettle's Charity, L. R. 14 Eq. 434.

<sup>3</sup> Beckwith *v.* St. Philip's Parish, 69 Ga. 564. See § 300.

<sup>4</sup> Andrews *v.* Andrews, 110 Ill. 230; Richmond *v.* Davis, 103 Ind. 449; Webster *v.* Morris, 66 Wis. 366.

(*a*) Abend *v.* End. Fund Commission, 174 Ill. 96; *supra*, § 384.

given for a life and twenty-one years and nine months, because until that time has elapsed it cannot be told with certainty who will come within the description of the last taker; consequently, though all the world joins in the conveyance, no title can be given until the final event is known. A testator is allowed to go thus far and no farther. If he makes his gift depend upon conditions, limitations, or events that may require more than a life or lives in being and twenty-one years and nine months for their accomplishment, he has created what the law calls a perpetuity, which is void, and the first taker takes a fee discharged of all attempted limitations.<sup>1</sup> So if a testator ties up his property for a term, by possibility, longer than a life or lives in being and twenty-one years and nine months, and then gives it over to a charity, the gift to the charity is void, because of the perpetuity in the first taker.<sup>2</sup> (a) But a gift may be made to a charity not *in esse* at the time, to come into existence at some uncertain time in the future, provided there is no gift of the property in the first instance, or perpetuity in a prior taker.<sup>3</sup>

<sup>1</sup> Church in Brattle St. v. Grant, 3 Gray, 143.

<sup>2</sup> Company of Pewterers v. Christ's Hosp., 1 Vern. 161; Att. Gen. v. Gill, 2 P. Wms. 369; Wells v. Heath, 10 Gray, 25; Com'rs of Donations v. De Clifford, 1 Dru. & War. 254; Att. Gen. v. Hall, W. Kel. 13.

<sup>3</sup> Att. Gen. v. Downing, Wilmot, 1; Dick. 14; Amb. 550; Att. Gen. v. Bowyer, 3 Ves. 714; 5 Ves. 300; 8 Ves. 256; Att. Gen. v. Chester, 1 Bro. Ch. 464; Inglis v. Sailors' Snug Harbor, 3 Pet. 99; Sanderson v. White, 18 Pick. 336.

(a) In *Edgerly v. Barker*, 66 N. H. 434, it was held that the rule against perpetuities does not necessarily avoid a devise to grandchildren when forty years of age, though within its limitation, but the court may authorize the devise to take effect *cy près* on their reaching majority. But see *contra*, 9 Harv. L. Rev. 242. In general, if a gift is broad enough to allow the trustee to apply to unlawful as well as lawful purposes, the court will limit the

application to the lawful ones. *Church of Latter Day Saints v. United States*, 140 U. S. 665; *Staines v. Burton* (Utah), 53 Pac. 1015; *St. Paul's Church v. Att. Gen.*, 164 Mass. 188. But if a limitation is void under the rule against perpetuities, it is wholly void, and cannot by a *cy près* construction be held good as to the part within the period of perpetuity and void only as to the excess. *Post v. Rohrbach*, 140 Ill. 600.



So where property was given to one charity, to go over to another in a certain event, it was allowed to go over to the second charity after a lapse of two hundred years, on the ground that it was no more a perpetuity in one charity than in another.<sup>1</sup>

§ 737. As it is forbidden to create perpetuities by common-law conveyances, so it is equally illegal to attempt to create perpetuities through the creation of trusts. A perpetuity will no more be tolerated when it is covered by a trust than when it displays itself undisguised in a conveyance of the legal estate.<sup>2</sup> Thus a trust cannot be created that will suspend the absolute ownership of the property for a time longer than that allowed at law. A perpetual trust cannot be created for an individual and his heirs in succession forever;<sup>3</sup> and herein a charity differs, for a trust may be established which contemplates the payment of the income of a certain fund to some charitable purpose forever.<sup>4</sup> Indeed, it is always hoped, where funds are given in trust, the income to be applied to some church, almshouse, hospital, or school, that such institution will exist indefinitely, and that the donor's bounty will be a perennial spring for generations.<sup>5</sup> At the same time, it is to be observed that this rule, applied

<sup>1</sup> *Christ's Hosp. v. Granger*, 16 Sim. 83; 1 Mac. & Gor. 533; 1 Hall & Twells, 539; *Soc. for Prop. of the Gospel v. Att. Gen.*, 3 Russ. 142; *McDonough v. McDonough*, 15 How. 367; *Potter v. Thornton*, 7 R. I. 252.

<sup>2</sup> *Norfolk's Case*, 3 Ch. Ca. 20-28, 35-48; 1 Vern. 164.

<sup>3</sup> *Ante*, §§ 377, 400; *Thellusson v. Woodford*, 4 Ves. 227; 11 Ves. 112; *Hooper v. Hooper*, 9 Cush. 122; *Thorndike v. Loring*, 15 Gray, 391; *Hawley v. James*, 5 Paige, 445; *White v. Hale*, 2 Cold. 77.

<sup>4</sup> Trusts for perpetual charitable uses are not prohibited by common law, nor are they in conflict with the Constitution or the Code of California. *Estate of Hinckley*, 58 Cal. 457.

<sup>5</sup> *Franklin v. Armfield*, 2 Sneed, 305; *Grissom v. Hill*, 17 Ark. 483; *Bristol v. Whitton*, *Dwight*, Ch. Ca. 171; *Magdalen Coll. v. Att. Gen.*, 6 H. L. Ca. 205; *Perrin v. Carey*, 24 How. 465; *Williams v. Williams*, 4 Seld. 533; *King v. Parker*, 9 Cush. 82; *Dexter v. Gardner*, 7 Allen, 246; *Odell v. Odell*, 10 Allen, 1; *Dartmouth Coll. v. Woodward*, 4 Wheat. 641; *Paschal v. Acklin*, 27 Texas, 173; *Yard's App.*, 64 Penn. St. 95.

to charities, does not render any particular property inalienable; for the court can decree the sale of any trust property when an exigency arises; and even the soil upon which a church, hospital, almshouse, or schoolhouse is built, can be sold by a decree in equity, when it is desirable to remove from that particular place to another.<sup>1</sup>

§ 738. Analogous to the rule against perpetuities is the rule against accumulation, which does not permit a testator to give his estate to trustees to be accumulated by them for a time longer than a life or lives in being and twenty-one years and nine months. Public policy is said to be the foundation of this rule. Even accumulations for such a limited time have been found inconvenient, and statutes have been passed in England and in several of the United States establishing a still shorter period during which trust estates may accumulate. In all those States where there are statutes limiting the time of accumulation, charities will be governed by the statute, unless they are specially excepted from its operation.<sup>2</sup> But where there are no statute provisions, a trust to accumulate for charitable purposes will not be held to be within the rule. There is no limit named beyond which such accumulations cannot go; but a bequest of a hundred dollars to be paid into a savings-bank yearly for fifty years from the income of real estate, to be accumulated

<sup>1</sup> *Wells v. Heath*, 10 Gray, 17; *Shotwell v. Mott*, 2 Sandf. Ch. 55; *Tudor on Char.* 298; *Franklin v. Armfield*, 2 Sneed, 305; *Brown v. Meeting Street Baptist Society*, 9 R. I. 184; *Att. Gen. v. Warren*, 2 Swanst. 291; *Att. Gen. v. Newark*, 1 Hare, 395, 400; *Att. Gen. v. Kerr*, 2 Beav. 420; *Att. Gen. v. Hungerford*, 8 Bligh, 437, 463; *Att. Gen. v. Brettingham*, 3 Beav. 91; *In re Suir Island Charity School*, 3 Jo. & La. 171; *In re Parke's Charity*, 12 Sim. 329; *Ex parte Overseers of the Poor, Ecclesalt Bierlow*, 13 Eng. L. & Eq. 145, 16 Beav. 297; *Att. Gen. v. Biddulph*, 39 Eng. L. & Eq. 512; *Stanley v. Colt*, 5 Wall. 119; *Sohier v. Trinity Church*, 109 Mass. 1; *Yard's App.*, 64 Penn. St. 95; *Burton's App.*, 57 id. 203; *Gram v. Prussia, &c., Soc.*, 36 N. Y. 161; *Pine St. Soc. v. Weld*, 12 Gray, 170; *Chamberlayne v. Brackett*, L. R. 8 Ch. 210. See *Thorp v. Fleming*, 1 Houst. 580.

<sup>2</sup> *Ante*, §§ 392-400; *Martin v. Margham*, 14 Sim. 230; *Kilpatrick v. Johnson*, 15 N. Y. 322.

during the fifty years by adding interest to principal semi-annually, and at the expiration of the term to be appropriated to a home for indigent old people, was held to be a good *devise*, and not within the rule against accumulations.<sup>1</sup> (a) But if an estate given to trustees for charity is once vested in them for a lawful purpose, all unlawful conditions, limitations, powers, trusts, or restraints annexed thereto, as directions for the management of the fund, and not of the essence of the gift, will fall away and be simply void, leaving the estate still vested in the trustees to be managed in a legal manner for the purposes of the charity.<sup>2</sup> As where a testator gave a fund to a town in its corporate capacity to establish a school, on condition that the children of nine families named were excluded for one hundred years, the court held the bequest a good charitable bequest for a school, and that it vested in the town in its corporate capacity; but that, as a town could not make distinctions between its citizens in administering any public property which it had a right to hold, the limitations and conditions upon the gift fell away from it as illegal and repugnant.<sup>3</sup>

§ 739. Another particular in which courts have favored charities was to supply all defects in conveyances or bequests to charitable uses; as, where the will of a married woman,

<sup>1</sup> *Odell v. Odell*, 10 Allen, 1; *Philadelphia v. Girard*, 45 Penn. St. 1; *Williams v. Williams*, 4 Seld. 537; *State v. Girard*, 2 Ired. Ch. 210. A different rule was held in *Hillyard v. Miller*, 10 Penn. St. 326; but the case was overruled in the case of *Philadelphia v. Girard*. See *Odell v. Odell*, *sup.*, for a full and able discussion of the cases. *University v. Yarrow*, 1 De G. & J. 79.

<sup>2</sup> *Philadelphia v. Girard*, 45 Penn. St. 1; *Williams v. Williams*, 4 Seld. 538. Since the case of *Williams v. Williams*, the courts of New York have subjected charities to all the rules and the statute against perpetuities. *Levy v. Levy*, 33 N. Y. 97; *Bascomb v. Albertson*, 34 N. Y. 504; *Wilson v. Lynt*, 30 Barb. 124; 6 How. (N. Y.) 348; *University v. Yarrow*, 1 De G. & J. 79; *Wetmore v. Parker*, 7 Lansing, 121.

<sup>3</sup> *Nourse v. Merriam*, 8 Cush. 11; *University v. Yarrow*, 1 De G. & J. 79.

(a) See *St. Paul's Church v. Att. Gen.*, 164 Mass. 188.

utterly void at law, was held good as an appointment to charitable uses; and a will, utterly void before the statute, was held to be made good by the passage of the statute; and though the statute of Hen. VIII. forbids devises of land to corporations, yet such wills were held good, as appointments.<sup>1</sup> This doctrine has not of late received the cordial assent of the English courts;<sup>2</sup> and, as it never prevailed in America, it is not necessary to state it in detail.<sup>3</sup> Courts will supply defects in conveyances to charitable purposes only so far as relates to uncertainty in the trustees or in the *cestuis que trust*, as before stated. For example, where a will provided that the income of certain property should be used to support meritorious indigent theological students while resident at C., in sums not exceeding \$100 to \$150 a year for three years, and there were not a sufficient number of such students to exhaust the income, which had largely increased, the court held that the object of the trust could be best carried out by increasing the amount to be paid to each beneficiary.<sup>4</sup>

§ 740. There are many English cases upon marshalling the assets of a testator for the payment of debts, legacies, and charitable bequests. The statute of mortmain has been construed to forbid the payment of charitable legacies from the proceeds of the sale of real estate, if the will was made within a year of the death of the testator. This circumstance, with other peculiarities in the English law, has given

<sup>1</sup> Duke, 84, 85; Bridgman's Duke, 355; Damon's Case, Moore, 822; Smith v. Stowell, 1 Ch. Cas. 195; Collinson's Case, Hob. 136; Att. Gen. v. Combe, 2 Ch. Cas. 18; Griffith Flood's Case, Hob. 136; Christ's College, 1 W. Black. 90; Att. Gen. v. Bowyer, 3 Ves. Jr. 714; 1 Dru. & War. 308; Mills v. Farmer, 1 Mer. 55; Att. Gen. v. Rye, 2 Vern. 453; Rivett's Case, Moore, 890; Att. Gen. v. Burdett, 2 Vern. 755; Christ's Hospital v. Hames, Bridgman's Duke, 371; Tuffnell v. Page, 2 Atk. 37; Fay v. Slaughter, Pr. Ch. 16; Kenson's Case, Hob. 136.

<sup>2</sup> *Ante*, § 88; Moggridge v. Thackwell, 7 Ves. 87; Jenner v. Hooper, Pr. Ch. 389; Att. Gen. v. Bain, id. 271; Adlington v. Cann, 3 Atk. 141.

<sup>3</sup> Harvard Coll. v. Soc. for Promoting Education, 3 Gray, 283.

<sup>4</sup> Theological Education Society v. Att. Gen., 135 Mass. 285.

rise to much litigation, and to many nice distinctions and rules which are inapplicable to the jurisprudence of America. Here the debts of a deceased person must first be paid; and the entire estate, real and personal, is held for that purpose. Legacies are then paid out of the personal assets, or out of the real estate, if the personal fails; and they are charged upon the personalty. If the fund is not sufficient for the payment of all in full, they must all abate in proportion, whether they are charitable legacies or otherwise.<sup>1</sup>

§ 741. Bequests to be paid over to trustees in a foreign country, for the establishment in such country of a charitable institution, will be paid over to such trustees, by order of court, to be administered by them under the jurisdiction of the courts of their own country.<sup>2</sup> But if the bequest is contrary to law in the country where it is made, or contrary to public policy, as a bequest in England to found nunneries in a foreign country, it is void, and the court will not order it to be paid over.<sup>3</sup> (a) A trust for charity, so created by a tes-

<sup>1</sup> It is not necessary to pursue this subject further. The reader will find the cases carefully collected and discussed in 2 Story, Eq. Jur. §§ 1180, 1180 a, 1 Jarm. on Wills, 213 (3d Eng. ed.).

<sup>2</sup> *Washburn v. Sewell*, 9 Met. 280; *Provost of Edinburgh v. Aubery*, Amb. 336; *Collyer v. Burnett*, Tam. 79; *Att. Gen. v. Lepine*, 2 Swanst. 181; 19 Ves. 309; *Chamberlain v. Chamberlain*, 43 N. Y. 424; *Silcox v. Harper*, 32 Ga. 639; *Mitford v. Reynolds*, 1 Phil. 185; *Emery v. Hill*, 1 Russ. 112; *Mayor of Lyons v. East Indian Co.*, 1 Moore, P. C. 273; *Minet v. Vulliamy*, 1 Russ. 113, n.; *Att. Gen. v. London*, 3 Bro. Ch. 171; 1 Ves. Jr. 243; *Oliphant v. Hendrie*, 1 Bro. Ch. 571, n.; *Soc. for Prop. Gospel v. Att. Gen.*, 3 Russ. 142; *Campbell v. Radnor*, 1 Bro. Ch. 171; *Att. Gen. v. Chester*, id. 444; *Curtis v. Hutton*, 14 Ves. 537; *Mackintosh v. Townshend*, 16 Ves. 330.

<sup>3</sup> *De Garcin v. Lamson*, 4 Ves. 433, n.; *De Themmines v. De Bonneval*, 5 Russ. 292. But see *Chamberlain v. Chamberlain*, 43 N. Y. 424.

(a) The fact that a charity is to be administered in a foreign country does not make it invalid. *Teele v. Bishop of Derry*, 168 Mass. 341. The validity of a charitable devise depends, as to land, and as against the heir, upon the law of the State where the land lies; as to personalty, as against the next of kin, upon the law of the testator's domicile. *Jones v. Habersham*, 107 U. S. 174; *Duggan v. Slocum*, 83 F. R. 245; 92 id. 806.

tator in his will as to be void in the State where it is created, will be void, although it is a legal trust in the State where the charity is to be established.<sup>1</sup> So if the trustees in the foreign country refuse to receive the funds, the trust will be void, and the money will go to the next of kin; as, where a devise was made in England to the President and Vice-President of the United States and the Governor of Pennsylvania, for establishing a college in Pennsylvania, for the purpose, among others, of vindicating the rights of the colored people to an equality with whites, the trustees named refusing to receive the funds and execute the trust, it was held to have failed, the court having no power to enforce its performance in a foreign jurisdiction.<sup>2</sup> Mr. Smithson, an Englishman, gave the funds for the Smithsonian Institution at Washington by his last will, and they were paid over upon the suit of the President of the United States *v. Drummond*, executor.<sup>3</sup> If there is sufficient reason arising out of the terms of the will or otherwise, the court can order the principal fund to be invested within their jurisdiction, and the income only to be paid over to the foreign trustees.<sup>4</sup>

§ 742. The trustees of a charity frequently procure an act of incorporation, in order to carry out the intention of their donor with more convenience. Care should be taken in such cases that the act of incorporation does not alter or change the true objects of the donor. These charitable corporations are called eleemosynary corporations; and the trustees of such a corporation have such vested rights under the gift of the donor and the act of incorporation that they cannot be controlled by subsequent legislation made to affect that particular case.<sup>5</sup> But the corporation may be enlarged

<sup>1</sup> *Bascomb v. Albertson*, 34 N. Y. 584.

<sup>2</sup> *New v. Bonaker*, L. R. 4 Eq. 654; *Levy v. Levy*, 33 N. Y. 97.

<sup>3</sup> Cited in *Whicker v. Hume*, 7 H. L. Ca. 124.

<sup>4</sup> *Att. Gen. v. Lepine*, 2 Swanst. 181; *Att. Gen. v. Sturge*, 19 Beav. 597.

<sup>5</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518; see Webster's speech, 5 Webster's Works, 462, and cases cited; *St. John's College v. State*, 15 Md. 330; *Brown v. Hummel*, 6 Pa. St. 86; *State v. Adams*, 4 Mo. 570.

and still retain its authority over the original charity.<sup>1</sup> On the institution of such a charity, a visitatorial jurisdiction arises of common right to the founder and his heirs, or to those whom the founder has substituted in the place of himself and his heirs.<sup>2</sup> The duty of the visitor is to hear and determine all differences of the members of the company among themselves, and generally to superintend the internal government of the body, and to see that all rules and orders of the corporation are observed.<sup>3</sup> The visitor must take, as his guide, the regulations or statutes originally propounded by the founder;<sup>4</sup> and so long as he does not exceed his province, his decision is final, and cannot be questioned by way of appeal.<sup>5</sup> With this visitatorial power the court of chancery has nothing to do: it is only as respects the administration of the corporate property that the court has any jurisdiction. Chancery cannot interfere with the elections or any other internal arrangements of such corporations, although they may be irregular;<sup>6</sup> but whenever there is any complaint of a

As an illustration of an act incorporating the trustees of a charity. see c. 119 of the Acts of Massachusetts, 1868.

<sup>1</sup> *Girard, &c. v. Philadelphia*, 7 Wall. 1: *McIntire v. Zanesville*, 17 Ohio St. 352.

<sup>2</sup> *Eden v. Foster*, 2 P. Wms. 326; *Att. Gen. v. Gaunt*, 3 Swanst. 148.

<sup>3</sup> *Phillips v. Bury*, Skin. 478; *Att. Gen. v. Crook*, 1 Keen, 126; *Att. Gen. v. York*, 2 R. & M. 468; *In re Birmingham School*, Gilb. Eq. R. 180.

<sup>4</sup> *St. John's College v. Toddington*, 1 Burr. 200; *Att. Gen. v. Locke*, 3 Atk. 165; *Att. Gen. v. Master of Catharine Hall*, Jac. 392.

<sup>5</sup> *Att. Gen. v. Moore*, 4 Green, Ch. 503; *In re Christ's Church*, L. R. 1 Ch. 126; *Att. Gen. v. Foundling Hosp.*, 2 Ves. Jr. 47; *In re Chertsey Market*, 6 Price, 272; *Att. Gen. v. Locke*, 3 Atk. 165; *Ex parte Berkhamstead School*, 2 Ves. & B. 138; *Poor of Chelmsford v. Mildmay*, Duke, 83; *Att. Gen. v. Clarendon*, 17 Ves. 499; *Eden v. Foster*, 2 P. Wms. 326; *Att. Gen. v. Dixie*, 13 Ves. 533; *Att. Gen. v. Bedford*, 2 Ves. 505; 5 Sim. 578; *Att. Gen. v. Browne's Hosp.*, 17 Sim. 137; *Att. Gen. v. Dedham School*, 23 Beav. 350; *Daugars v. Rivaz*, 28 Beav. 233; *Att. Gen. v. Dulwich College*, 4 Beav. 255.

<sup>6</sup> *Att. Gen. v. Clarendon*, 17 Ves. 498; *Whiston v. Rochester*, 7 Hare, 532; *Att. Gen. v. Dixie*, 13 Ves. 519; *Att. Gen. v. Middleton*, 2 Ves. 327; *Att. Gen. v. Dulwich College*, 4 Beav. 255; *Att. Gen. v. Magdalen College*, 10 Beav. 402; *Att. Gen. v. Bedford*, id. 505; *In re Bedford Charity*, 5 Sim. 578.

perversion of the funds of the institution, equity will immediately interfere and correct and remedy the abuse in the same manner that it proceeds against individual trustees.<sup>1</sup> (a)

§ 743. If an estate is given to an old corporation, it is not regarded in the same light as the property with which the charity was originally endowed, and the new gift will not be subject to the old visitatorial power, unless such is the plain or implied intention of the donor.<sup>2</sup> If the property is given generally, and no *special* purpose is named, the donor will be presumed to intend that the property shall be regulated by the general rules of the corporation;<sup>3</sup> but if a particular trust is annexed to the gift in the hands of the corporation, the visitatorial power of the original founder will be excluded, and the court will treat the corporation in respect to this fund as an ordinary trustee, or as an individual intrusted with the fund for a particular purpose.<sup>4</sup> If a private person founds a charity, and the crown grants a charter, the presumption is that the crown intended to carry out the intentions of the donor, and the jurisdiction of the court of chancery will be continued.<sup>5</sup> If a church has funds, a part of which was contributed for the poor, and the balance for religious purposes, and the funds have become mingled, the

<sup>1</sup> Van Houten *v.* First Reformed Dutch Church, 2 Green, Ch. 137; Brunnenmeyer *v.* Buhre, 32 Ill. 183; Att. Gen. *v.* St. Cross Hosp., 17 Beav. 435; Att. Gen. *v.* Foundling Hosp., 2 Ves. Jr. 48; Att. Gen. *v.* Clarendon, 17 Ves. 499.

<sup>2</sup> Green *v.* Rutherford, 1 Ves. 472; Corp. of Sons of Clergy *v.* Mose, 9 Sim. 610; Phillips *v.* Bury, 1 Ld. Raym. 5; Comb. 265; Holt, 715; 1 Show. 360, 4 Mod. 106; Skin. 447.

<sup>3</sup> Ibid.; *Ex parte* Inge, 2 R. & M. 596; Att. Gen. *v.* Clare Hall, 3 Atk. 675; Hadley *v.* Hopkins, 14 Pick. 240.

<sup>4</sup> Green *v.* Rutherford, 1 Ves. 462; Corp. Sons of Clergy *v.* Mose, 9 Sim. 610.

<sup>5</sup> Att. Gen. *v.* Dedham School, 23 Beav. 350. See, also, *Ex parte* Wrangham, 2 Ves. Jr. 609; Att. Gen. *v.* Clarendon, 17 Ves. 498; Att. Gen. *v.* Black, 11 Ves. 191; Case of Queen's College, Jac. 1; King *v.* St. Catharine's Hall, 4 T. R. 233-244; *Re* Queen's College, 5 Russ. 64; *Re* University College, 2 Phil. 521.

(a) See Smyth *v.* Phillips Academy, 154 Mass. 1.



whole fund will not be devoted to the public charity; but as accurate a separation as possible will be made.<sup>1</sup> If the legislature makes a grant of land to a charitable corporation, for a school or college or for a religious or charitable purpose, such grant cannot be repealed.<sup>2</sup> But the legislature may change the trustees of a charity conferred upon a municipal corporation.<sup>3</sup>

§ 744. If the trustees of a charity abuse the trust, misemploy the charity fund, or commit a breach of the trust, the property does not revert to the heir or legal representative of the donor, unless there is an express condition of the gift that it shall revert to the donor or his heirs, in case the trust is abused;<sup>4</sup> (a) but the redress is by bill or information by the attorney general or other person having the right to sue. If a good public charity is created by gifts upon condition or with limitations, or by gifts for particular purposes, or to a certain end, the heir cannot defeat the charity by reason of a breach of the trust or perversion of the charity; but the courts upon proper proceeding will correct all abuses, and restore the charitable gift to its original purpose. Heirs and personal representatives of a donor have no beneficial interest reverting or accruing to themselves from the breach or non-execution of a trust for a charitable use.<sup>5</sup>

<sup>1</sup> *Att. Gen. v. Old South Soc.* 13 Allen, 474. Such a case differs widely from the mingling of two funds by the fault of the owner of one of them. Here the equities equally favor each fund.

<sup>2</sup> *University v. Fay*, 2 Hayw. 310; *Terrett v. Taylor*, 9 Cranch, 43; *Pawlett v. Clark*, id. 292.

<sup>3</sup> *Philadelphia v. Fox*, 64 Penn. St. 169; *Stone v. Framingham*, 109 Mass. 303.

<sup>4</sup> *Brown v. Meeting St. Bap. Soc.*, 9 R. I. 177.

<sup>5</sup> *Sanderson v. White*, 18 Pick. 328; *Dublin Case*, 38 N. H. 459; *Chapin v. School District*, 35 N. H. 445; *Hadley v. Hopkins*, 14 Pick. 241; *Heriot's Hospital v. Ross*, 12 Cl. & Fin. 507; 5 Bell, App. Cas. 37; *Pier-son v. Thompson*, 1 Edw. Ch. 212; *Benett v. Wyndham*, 4 De G., F. & J. 259; *Duncan v. Findlater*, 6 Cl. & Fin. 894; *Mersey Docks, etc. v. Gibbs*, 11 H. L. Cas. 686; L. R. 1 H. L. Cas. 93; *Reformed Dutch Church v.*

(a) *Sickles v. New Orleans*, 80 F. R. 868.

§ 745. Ordinary private trusts are not subject to the statute of limitations like other interests; for, so long as the relation of trustee and *cestui que trust* continues, no length of time can bar the rights of the beneficiary as the rights of a creditor may be barred. But where the relation is denied, and circumstances have occurred that render it impossible to do equity between the parties, lapse of time may be a bar.<sup>1</sup> Still less will the statute of limitations apply to a charitable trust, there being "no limitation against God and religion."<sup>2</sup> Where a corporation held the property of a charity for one hundred and fifty years adversely under a deed of purchase, but with notice of the charitable use, it was decreed that the property should be reconveyed upon the original trusts;<sup>3</sup> nor will lapse of time be allowed to establish any perversion or abuse of a charitable trust, if the original purpose can be clearly determined.<sup>4</sup> But great lapse of time is frequently a controlling element in disposing of charity suits; for if a charity has been administered for a long time without question, the court will not interfere to change it without conclusive evidence that the charity has been perverted.<sup>5</sup> A continued use, with the assent of all parties, for a great

Mott, 7 Paige, 77; Good v. McPherson, 5 Mo. 126. See also Att. Gen. v. Wax Chandlers' Co., L. R. 6 H. L. Cas. 1, where it was said that very little stress could be laid upon the word "condition" in a bequest to a charity, as it may mean simply "intent and purpose," and may be employed to create a trust and nothing more. But see Henderson v. Hunter, 59 Pa. St. 335.

<sup>1</sup> Prevost v. Gratz, 6 Wheat. 481; Wedderburn v. Wedderburn, 4 My. & Cr. 41; Portlocke v. Gardner, 1 Hare, 594; Bridgman v. Gill, 24 Beav. 302; Michoud v. Girod, 4 How. 561; Att. Gen. v. Fishmongers' Co., 5 My. & Cr. 16; Knight v. Bowyer, 2 De G. & J. 421; Watson v. Saul, 5 Jur. (N. S.) 404; Att. Gen. v. Bristol, 2 J. & W. 321; Shelford, 498.

<sup>2</sup> Att. Gen. v. Coventry, 2 Vern. 399; Att. Gen. v. Bristol, 2 J. & W. 321; Att. Gen. v. Exeter, Jac. 448; Att. Gen. v. Brewers' Co., 1 Mer. 498; Incorp. Soc. v. Richards, 1 Con. & Law. 58; 1 Dru. & War. 258.

<sup>3</sup> Att. Gen. v. Christ's Hosp., 3 My. & K. 344.

<sup>4</sup> Att. Gen. v. Munro, 2 De G. & Sm. 122; Mulligan v. Mitchell, 3 M. & Cr. 73; Att. Gen. v. Beverly, 6 De G., M. & G. 256.

<sup>5</sup> Att. Gen. v. Rochester, 5 De G., M. & G. 822; Att. Gen. v. Ref. Prot. Dutch Church, 33 Barb. 303; Att. Gen. v. St. John's Hosp., 11 Jur. (N. S.) 629; Att. Gen. v. Old South Soc., 13 Allen, 474.

length of time, must have an influence in the construction of all written instruments, especially if there is any doubt as to their true meaning.<sup>1</sup> If such use was contemporaneous with the foundation, and has continued uninterrupted and uncorrected for a great length of time, where there was opportunity for complaint and correction, the arrangement will not be disturbed.<sup>2</sup> A statute now bars the attorney general from interfering, after an acquiescence of twenty years.<sup>3</sup> On the same principle, long-continued use in applying the funds of a religious society to the teaching of a particular form of doctrine will have great weight in giving a construction to the instrument under which the funds were settled.<sup>4</sup> It was held, in *Attorney General v. Federal Street Meeting-House*, that a trust to maintain public worship in the Presbyterian form, in a particular meeting-house, might be terminated by the unanimous consent of all the worshippers and pew-holders of that house, and that where there had been a use of the funds for forty years under a claim of right, adversely to the first use, it was too late to attempt to restore the funds to the original use.<sup>5</sup>

§ 746. In a private suit in equity, whether to enforce or regulate a trust, or to obtain any other private redress, the pleadings must be so framed that a decree can be made upon the statement in the bill or answer, and upon the prayer for relief, if the plaintiff prevails; but in suits for establishing, regulating, controlling, or correcting charitable trusts, courts disregard all technicalities. If the case is brought before the

<sup>1</sup> *Att. Gen. v. Rochester*, 5 De G., M. & G. 822; *Att. Gen. v. Beverly*, 6 De G., M. & G. 268; *Att. Gen. v. Bristol*, 2 J. & W. 321; *In re Chertsey Market*, 6 Price, 261-285; 6 II. L. Cas. 189.

<sup>2</sup> *Att. Gen. v. Skinners' Co.*, 5 Sim. 596; *Att. Gen. v. Brazenose College*, 2 Cl. & Fin. 295; *Att. Gen. v. Winsor*, 6 Jur. (N. S.) 833; *Att. Gen. v. Catharine Hall*, Jur. 381; *Mayor of South Molton v. Att. Gen.*, 27 Eng. L. & Eq. 17; *Att. Gen. v. Coventry*, 2 Vern. 397; *Att. Gen. v. Scott*, 1 Ves. 413.

<sup>3</sup> 3 and 4 Wm. IV. c. 27; *Att. Gen. v. Payne*, 27 Beav. 168.

<sup>4</sup> *Dublin Case*, 38 N. H. 459.

<sup>5</sup> *Att. Gen. v. Federal Street Meeting-House*, 3 Gray, 1.

court by bill or information, it takes jurisdiction over the administration of the charity, and makes the proper orders and decrees for the right administration of the fund, whether the pleadings are formal or informal, and whether the proper relief is prayed for or not.<sup>1</sup> In charity cases, the most expeditious and least expensive methods should be adopted;<sup>2</sup> and a proper decree for relief will be made, although relief of an entirely different character is prayed for.<sup>3</sup> Courts are not bound by the strict rules of practice in granting injunctions or stay of proceedings at law in such cases.<sup>4</sup> It cannot be objected to a proceeding by the attorney general in equity, in the matter of a charity, that there is an adequate remedy at law.<sup>5</sup> But if there are any such informalities in the record as will be prejudicial to the defendants, the court will not proceed until such informalities are corrected.<sup>6</sup> The only manner in which courts can administer charities is to give directions to the trustees; but courts will not retain an information in order to make decrees from time to time.<sup>7</sup> The proper method is to apply anew. But in one case where an information charged a state of facts inconsistent with the true state of the case as set forth in the answer, and the relators set the case down for hearing without amendment, with a prayer for relief founded upon an untrue statement of the case, and without having applied to the trustees to correct the alleged abuse, the information was dismissed with costs, although some relief might have been granted upon a

<sup>1</sup> *Att. Gen. v. Hartley*, 2 J. & W. 370; *Att. Gen. v. Jackson*, 11 Ves. 372; *Att. Gen. v. Whitely*, id. 241; *Att. Gen. v. Stamford*, 2 Swanst. 591; *Att. Gen. v. Jeans*, 1 Atk. 355; *Att. Gen. v. Brooks*, 13 Ves. 318; *Att. Gen. v. Smart*, 1 Ves. 72; *Att. Gen. v. Oglander*, 1 Ves. Jr. 246; *Att. Gen. v. Bucknall*, 2 Atk. 328; *Att. Gen. v. Middleton*, 2 Ves. 327; *Att. Gen. v. Brereton*, 2 Ves. 425; *Att. Gen. v. Parker*, 1 Ves. 43; *Att. Gen. v. Vivian*, 1 Russ. 226.

<sup>2</sup> *Rochester v. Att. Gen.*, 4 Bro. P. C. 643.

<sup>3</sup> *Att. Gen. v. Whitely*, 11 Ves. 241.

<sup>4</sup> *Att. Gen. v. Pearson*, 3 Mer. 396.

<sup>5</sup> *Att. Gen. v. Galway*, 1 Moll. 95.

<sup>6</sup> *Att. Gen. v. Warren*, 2 Swanst. 310.

<sup>7</sup> *Att. Gen. v. Haberdashers' Co.*, 1 Ves. Jr. 295.

proper statement of the case, and upon fair conduct towards the trustees.<sup>1</sup> The parties to be bound by the decree should be made parties to the suit at the time the decree is made. This is a formality that will not be dispensed with; as, where during the pendency of a suit new trustees in part had been chosen, but had not been made parties at the time the decree was entered, upon a new information brought to enforce the decree, the new trustees, though a minority of the number, were adjudged not to be bound by the decree; and they were allowed to plead other facts to show that the decree ought not to be carried into effect against any of the trustees.<sup>2</sup>

§ 747. Courts of equity have entire control over the matter of costs between the parties to a private suit. Costs in all cases in equity are within the sound discretion of the court, though they are usually allowed to the prevailing party.<sup>3</sup> If a suit arises between the trustees of a charity fund and strangers, the ordinary rules as to costs will be applied, and if there is a decree against the trustees they may be ordered to pay taxable costs as between parties;<sup>4</sup> but if it was a proper suit for the trustees to prosecute or defend, they will be allowed the costs so paid by them together with reasonable counsel fees, in their accounts.<sup>5</sup> Where a suit arises between the heir and the trustees whether there is a proper bequest to a charitable use, and whether the charity can be established; or where a suit arises between the trustees and the *cestuis que trust*, if there are any that can come into court, or the attorney general and the trustees as to the establishing and administering of the charity, — costs will be allowed to all parties, together with reasonable counsel fees or costs

<sup>1</sup> Att. Gen. v. Grocers' Co., 1 Keen, 506.

<sup>2</sup> Att. Gen. v. Foster, 13 Sim. 262; 2 Hare, 81.

<sup>3</sup> Twisleton v. Thelwell, Hard. 165; Uvedale v. Uvedale, 3 Atk. 119; Bartlett v. Johnson, 9 Allen, 537.

<sup>4</sup> Burgess v. Wheate, 1 Eden, 251; Edwards v. Harvey, G. Cooper, 40; Hill v. Morgan, 2 Moll. 460; Elsey v. Lutyens, 8 Hare, 164; Rashley v. Master, 1 Ves. Jr. 201; Brodie v. St. Paul, id. 326; Mohun v. Mohun, 1 Swanst. 201.

<sup>5</sup> Hill on Trustees, 551.

as between solicitor and client, out of the charity fund or estate.<sup>1</sup> But the allowance of costs will depend upon the question, whether the issues raised were fit and proper to be raised and determined by the court. If the issues are immaterial or trifling, or if the conduct of a party is vexatious and litigious, or if he raises improper points, or in any way creates unnecessary delay or expense, the court will not only refuse him costs, but will order him to pay costs.<sup>2</sup> Although proper relief may be granted upon very defective pleadings, yet the court will consider the state of the record upon the question of costs.<sup>3</sup> Where one fund is apportioned among several charities, and a suit arises in relation to one charity, the costs, as a general rule, will come out of the fund apportioned to that charity;<sup>4</sup> but in some cases they may come out of the whole fund. The courts use this absolute power over costs as a means of checking improper suits or defences.<sup>5</sup>

§ 748. The distinctive principles of equity, which courts apply to the enforcement and regulation of trusts for charitable uses, are confined to those States which have adopted the Statute 43 Eliz. c. 4, or the principles of the common law in regard to trusts, as they existed prior to the statute. In some States, the statute is expressly repealed; and such repeal has been held to carry with it all the distinctive doctrines of public charities, as they are held in England. In

<sup>1</sup> *Currie v. Pye*, 17 Ves. 462; *Bliss v. Amer. Bible Soc.*, 2 Allen, 334; *Att. Gen. v. Moor's Ex'rs*, 19 N. J. Eq. 509, where it is said that it is the right of the trustees to come into court for instructions and directions, and that it is the practice to allow the costs and expenses of all parties as between attorney and client. 3 Dan. Ch. Prac. 1554. But no such rule prevails in New York. In such cases the prevailing party will be allowed his legal costs, but no allowance out of the estate for counsel fees will be made to either party. *Rose v. Rose*, 28 N. Y. 184.

<sup>2</sup> *East v. Ryall*, 2 P. Wms. 284; *Att. Gen. v. Munro*, 2 De G. & Sm. 122; *Att. Gen. v. Grocers' Co.*, 1 Keen, 506; *Att. Gen. v. Cullum*, id. 104; *Att. Gen. v. Mercers' Co.*, 2 My. & K. 654; *Att. Gen. v. Vivian*, 1 Russ. 226.

<sup>3</sup> *Att. Gen. v. Hartley*, 2 J. & W. 370.

<sup>4</sup> *Att. Gen. v. Kerr*, 4 Beav. 297.

<sup>5</sup> *Att. Gen. v. Merchant Tailors' Co.*, 5 L. J. (N. S.) Ch. 62.

other States, the statute is said to have been adopted, or to be in force. The law of other States is founded upon what is supposed to have been the common law, or the ordinary jurisdiction and practice of the court of chancery prior to the statute. It is not very material whether courts of equity, in the several States, trace their jurisdiction to the statute itself as in force in their State, or whether they exercise the jurisdiction as original and inherent in courts of equity by common law, anterior to the statute. Substantially the same principles are applied, and the same results are reached, in either case.

<sup>1</sup> In Alabama, the general principles of the statute of 43 Eliz. are acted upon by courts of equity, as a part of their inherent jurisdiction. The cases in which the doctrines are discussed are *Antones v. Eslava*, 9 Porter, 527; *Carter v. Balfour*, 19 Ala. 814; *Williams v. Pearson*, 38 Ala. 299. *Johnson v. Longmire*, 39 Ala. 143. From the principles announced by the court, there is no reason why they should not exercise all the equity powers of the English court of chancery.

In Arkansas, the court has determined that public charity is not controlled by the rules against perpetuities. *Grisson v. Hill*, 17 Ark. 433.

In Connecticut, the statute was substantially re-enacted in 1702. *Greene v. Dennis*, 6 Conn. 293; *Bull v. Bull*, 8 Conn. 47; *Chatham v. Brainard*, 11 Conn. 60; *Amer. Bible Soc. v. Wetmore*, 17 Conn. 188; *Hampden v. Rice*, 24 Conn. 350. In *Fiske v. White*, 22 Conn. 32, the court declined to establish a trust in which the trustees were to expend the gift in educating young men studying for the ministry at New Haven, on account of the uncertainty of the beneficiaries. But in *Treat's App.*, 30 Conn. 113, a very indefinite and vague trust was established. The later case will be more likely to be followed in the great majority of States. See also *Brewster v. McCall*, 15 Conn. 274.

In Georgia, the courts exercise an original and inherent jurisdiction over public charities upon the principles of the statute, and apply liberal rules of construction to carry out the intention of the donor. *Beal v. Fox*, 4 Ga. 404; *Walker v. Walker*, 25 Ga. 420.

In Illinois, the statute is said to be in force, and courts will carry out the intention of the donor in establishing a charity. They disclaim the power to change the object, *cy près*, and decide that a charity must be accepted as given. All of which is undoubted law; but from the principles of interpretation laid down there is no reason why they should not carry out the intention of the donor *cy près*, if there fail to be any objects of his charity, as originally given and administered. And this doctrine has been applied to a certain extent. *Gilman v. Hamilton*, 16 Ill. 225; *Heuser v. Harris*, 42 Ill. 425.

In Indiana, courts act upon the statute, and enforce general and indefinite charities, according to the intention of the donors and upon the principles of courts of equity. *McCord v. Ochiltree*, 8 Blackf. 15; *Sweeney v. Sampson*, 5 Ind. 465; *Indianapolis v. Grand Master*, 25 Ind. 518; *Ex parte Lindley*, 32 Ind. 367. See *Richmond v. State*, 5 Ind. 334. In *Grimes v. Harmon*, 35 Ind. 198, the law is very fully discussed, and several propositions are stated as the law of Indiana. The case of *White v. Fish*, and a few New York cases, are relied upon.

In Iowa, the courts act on an original and inherent jurisdiction over charitable bequests, and lay down the rule that courts are acting judicially as long as they effectuate the intention of a donor. *Miller v. Chittenden*, 4 Iowa, 252. They also hold that if the object of a trust is certain, but there is no trustee, the court will appoint one. *Johnson v. Mayne*, 4 Iowa, 180. But if the objects are uncertain, and no trustee is appointed, the trust will fail. *Le Page v. McNamara*, 5 Iowa, 146.

In Kentucky, the statute of Eliz. is in full force by adoption, and the courts have carried their equity jurisdiction to the extreme verge of the law in establishing charities. *Church v. Church*, 18 B. Mon. 635; *Hadden v. Chorn*, 8 B. Mon. 78; *Gass v. Wilhite*, 2 Dana, 170, discuss special cases. In *Moore v. Moore*, 4 Dana, 354, a charity was established by which the judges of the county courts were to select the objects. In *Cronin v. Louisville, &c. Soc.*, 3 Bush, 365, a bequest to a corporation already holding the amount of property which it was allowed to take, was held to lapse. In *Att. Gen. v. Wallace*, 7 B. Mon. 611, a general gift to charitable and religious purposes, without trustees and without any machinery pointed out or referred to by which trustees were to be appointed, was sustained. This case goes further than any other case observed in the United States. Other cases have been sustained where the appointment of trustees was in terms referred to the court. And cases have been sustained where trustees, incapable of taking, were nominated in the will, whereby it appeared that the donor intended that his trustees should reduce his general and indefinite intent to a practical certainty. *Att. Gen. v. Wallace* is an exception to the general rule that courts in England and America act upon when they do not profess to exercise any extraordinary or prerogative powers.

Louisiana has a liberal system of charitable trusts under its code, which was derived from the civil law. The statute of Eliz. was never in force in the State, as its laws were derived from France and Spain. See *Soc. of Orphan Boys v. New Orleans, &c.*, 12 La. An. 62; *New Orleans v. McDonogh*, id. 240; *Fink v. Fink*, id. 201.

In Maine, the statute is in force, or rather the courts act upon the doctrine that the equity jurisdiction of chancery over charities was original and inherent in courts of equity before the statute. Their courts carry out the intention of donors by establishing charitable gifts made to voluntary societies for indefinite purposes. *Shapleigh v. Pillsbury*, 1 Maine,



271; *Tappan v. Deblois*, 45 id. 222; *Preachers' Aid Soc. v. Rich*, id. 55; *Howard v. Amer. Peace Soc.*, 49 id. 228; *Swasey v. Amer. Bible Soc.*, 57 id. 526; *Kimball v. Universalist Soc. in Sweden*, 34 id. 434.

In Maryland, neither the statute nor the principles of the statute have ever had any recognition in its courts. No trust for charity can be established, unless the beneficiaries are so certain that they can maintain an action in court in their own names for the benefit of the fund. Of course, under such a rule, no trust for the poor of a city, or of the wards of a city, to be relieved according to the discretion of the trustees, can be maintained, and such are the decisions. *Wilderman v. Baltimore*, 8 Md. 550; *Methodist Church v. Warren*, 28 Md. 338; *Dashiel v. Att. Gen.*, 5 Harr. & J. 392; 6 Harr. & J. 1; *Murphy v. Dallam*, 1 Bland, 529; *Beaty v. Kurtz*, 2 Pet. 566; *Needles v. Martin*, 33 Md. 609.

In Massachusetts, the statute is in full force, and the courts have established a great variety of charitable bequests. A very liberal rule of interpretation has been adopted to ascertain the intention of donors, and such intention has been carried into effect as near as may be. *Bartlett v. King*, 12 Mass. 536; *Going v. Emery*, 16 Pick. 107; *Sanderson v. White*, 18 Pick. 328; *Burbank v. Whitney*, 24 Pick. 146; *Washburn v. Sewall*, 9 Met. 280; *Bartlett v. Nye*, 4 Met. 378; *Brown v. Kelsey*, 2 Cush. 243; *Winslow v. Cummings*, 3 Cush. 358; *Tucker v. Seamen's Aid Soc.*, 7 Met. 188; *Sohier v. St. Peter's Church*, 12 Met. 250; *North Adams v. Fitch*, 8 Gray, 241; *Wells v. Doane*, 3 Gray, 201; *Easterbrooks v. Tillinghast*, 15 Gray, 17; *Nourse v. Merriam*, 8 Cush. 11; *Earle v. Wood*, id. 445; *Dexter v. Gardner*, 7 Allen, 246; *Wells v. Heath*, 10 Gray, 17; *Att. Gen. v. Old South Soc.*, 13 Allen, 477; *Fairbanks v. Sampson*, 99 Mass. 533; *Hadley v. Hopkins's Acad.*, 14 Pick. 240; *Tainter v. Clark*, 5 Allen, 66; *Att. Gen. v. Trinity Church*, 9 Allen, 422; *Baker v. Smith*, 13 Met. 41; *Parker v. May*, 5 Cush. 336; *Bliss v. Amer. Bible Soc.*, 2 Allen, 334; *Drury v. Natick*, 10 Allen, 169; *Hosea v. Jacobs*, 98 Mass. 65; *Barker v. Wood*, 9 Mass. 419. In *Odell v. Odell*, 10 Allen, 1, it was determined that the common-law rule against perpetuities and accumulations did not apply to trusts for public charities. In *Saltounstall v. Sanders*, 11 Allen, 447, it was determined that the word "benevolent" meant "charitable," and in *Amer. Acad. v. Harvard College*, 12 Gray, 582, and in *Jackson v. Phillips*, 14 Allen, 540, it was determined that the intention of the donor, to be ascertained by liberal rules of construction, would be carried into effect, *cy près*, if the original objects of the charity failed. In *Harvard Coll. v. Soc. Prom. Theol. Educ.*, 3 Gray, 281, it was determined that the court could not transfer the funds of a charity from one board to another, or remove trustees for the mere convenience of parties; and in *Att. Gen. v. Garrison*, 101 Mass. 223, it was determined that the court would remove a trustee, when he did not sympathize with the scheme of administering the charity, as settled by the court upon a reference to a master, and there was danger that he would not carry out the scheme with proper energy

and efficiency. It will be seen that the court has dealt with a great variety of cases. It professes to adhere to the strict chancery jurisdiction of courts of equity, without invoking any of the extraordinary powers of the chancellor as keeper of the king's conscience. Some of the cases that enforce gifts in trust to voluntary and defunct associations reach the extreme verge of the law; but it is probable that the English chancery would have enforced every one of these trusts without calling in the extraordinary aid of prerogative power. It is proper to say that unincorporated religious societies are clothed with very considerable legal power. See Public Stat., 1882.

In Michigan, the statute was repealed, and trusts for charitable uses are not distinguished from others, and their validity depends upon the same rules. *Newark Meth. Epis. Ch. v. Clark*, 41 Mich. 730.

In Mississippi, courts exercise the inherent jurisdiction of equity over public trusts for charity. *Wade v. Amer. Colonization Soc.*, 7 Sm. & M. 663; *State v. Prewett*, 20 Miss. 165.

In Missouri, the court administers trusts for public charities upon the general principles of the statute, and with a liberal interpretation of its powers. *Chambers v. St. Louis*, 29 Mo. 543.

In New Hampshire, the courts have recognized the general principles of charitable trusts; but there are no direct decisions indicating how far the court will go in enforcing trusts for vague and indefinite purposes. *Duke v. Fuller*, 9 N. H. 538; *Chapin v. School Dist.*, 35 N. H. 454; *Sec. Cong. Soc. v. First Cong. Soc.*, 14 N. H. 315; *Brown v. Concord*, 33 N. H. 285; *Dublin Case*, 38 N. H. 459; *New Market v. Smart*, 4 Amer. Law Reg. (N. s.) 390.

In New Jersey, the statute was never in force; but the court of chancery exercises an inherent and extensive jurisdiction over charities, on principles acted upon in England and many of the States. In *Morris v. Thompson*, 19 N. J. Eq. 307, an interpretation was given to the word "benevolence," used in connection with the words "religious" and "charitable," following the cases of *Ommanney v. Butcher*, and *Williams v. Kershaw*, and differing from the case of *Saltonstall v. Sanders*, in Massachusetts. In *Att. Gen. v. Moore*, 19 N. J. Eq. 503, the court speaks of the ordinary powers of the court, which are exercised in the ordinary equity jurisdiction in chancery, and the extraordinary power or jurisdiction which the court is called upon to exercise, and will exercise in establishing and regulating public charitable trusts. It is somewhat difficult to understand what is meant when an extraordinary power and jurisdiction is referred to, which will be exercised in establishing charitable trusts for public and vague purposes. If these words mean, that any prerogative or sovereign function can be exercised in performing judicial duties, it is certainly a mistake, unless the legislature has clothed the court with this part of the sovereign power which belongs to the *parens patriæ*; whether king, crown, people, or legislature. If it is simply intended that

an ordinary equity jurisdiction will be exercised in applying rules of interpretation and of law adapted to the subject-matter,—that is to charitable trusts of a public nature, and therefore, of necessity, vague, indefinite, and uncertain at times,—there is no occasion to find fault; for it is a mere use of words to describe the rules that will be applied. If it is meant that the rules to be applied to the judicial construction and administration of public charitable trusts are different from the rules applied to private trusts for individuals, and are in that sense extraordinary, there is no objection to the language. But if it is meant that any function, not strictly judicial within the ordinary and inherent jurisdiction of courts of equity over charities, can be exercised, the power is misapprehended. It must be a fundamental rule in America, that no public trust for charity can be established, unless the judges can establish it by strictly judicial determinations. If the gift is too imperfect or too indefinite to be established by the courts acting judicially, the legislature alone can establish it by special act, or the legislature may clothe the courts with such powers as it sees fit to confer.

In New York, many of the earlier cases decided that the courts had full jurisdiction over charitable bequests, to enforce them according to judicial rules. In one case, it was held that the jurisdiction of the chancellor was as extensive as the commission under the privy seal in England. *Wright v. Trustees of Meth. Epis. Church*, 1 Hoff. Ch. 202. This was carrying their power too far, and it was denied in *Ayres v. Trustees of Meth. Epis. Church*, 3 Sandf. S. C. 351. In *King v. Woodhull*, 3 Edw. Ch. 79, the common English judicial principles were applied; and cases have been sustained where gifts were made to unincorporated societies for charitable purposes. *Shotwell v. Mott*, 2 Sandf. Ch. 46; *Potter v. Chapin*, 6 Paige, 639; *Banks v. Phelan*, 4 Barb. 80; *Coggeshall v. Pelton*, 7 Johns. Ch. 292; *Newcomb v. St. Peter's Church*, 2 Sandf. 636; 2 Kent, 286; 4 Kent, 408; *People v. Steele*, 2 Barb. 397; *Miller v. Gable*, 2 Denio, 492; *Kniskern v. Lutheran Churches*, 1 Sandf. Ch. 439. *Inglis v. Sailors' Snug Harbor*, 3 Pet. 112, in the Supreme Court of the United States, decided, upon the law, as it was understood to exist in New York, that a devise to the chancellor, mayor, and recorder of New York, and several other persons by their official description for the time being, and their successors in office, adding, "if this cannot be done without an act of incorporation they should apply for one," was a good devise for a charitable use. *Williams v. Williams*, 4 Seld. 525, proceeded upon a very moderate and cautious rule, but there was very considerable dissent. *Trustees of Theo. Sem. v. Kellogg*, 16 N. Y. 83, was decided the same way. But the later cases have decided that no charitable trust can be established in that State, where the trustee named cannot take the legal title to all intents and purposes. There is a statute in New York forbidding a corporation to take lands for any purpose not germane to the purposes for which it was incorporated. So if a gift is made to a corporation for a charitable

purpose other than that for which the corporation exists, the gift fails, for the reason that the court will appoint no other trustee. *McCarter v. Orphan Asylum Soc.*, 9 Cow. 437; *Robertson v. Bullions*, 9 Barb. 64; 11 N. Y. 243. So if a bequest is made to a voluntary association in trust for a charity, the gift fails because the voluntary association is not capable of taking the property. *Owens v. Mission Soc.*, 14 N. Y. 380; *White v. Howard*, 52 Barb. 294; *Harris v. Amer. Bib. Soc.*, 2 N. Y. Dec. 316. The reasoning is, that the jurisdiction of the court attaches only where there is a trust, and there is a trust only where there is a trustee capable of taking. The general rule in private trusts is, that where a clear trust is created, but the trustee is not named, the court will not allow the clear intention to create a trust to fail for want of a trustee. And so it would appear that the clear intention of the testator that trustees should carry out his purpose might be carried into effect by the courts. A bequest to such five persons as the judges of the Supreme Court of Vermont should appoint to establish a school was held void. *Bascom v. Albertson*, 34 N. Y. 584. In this case, the ground is taken that the statute of Elizabeth was repealed by the New York statute of 1788; and that if the jurisdiction over charities existed before the statute of Elizabeth, still in 1788 it was universally supposed that the jurisdiction in England depended upon the statute; therefore, when the assembly repealed the statute in 1788, it must have intended to repeal the whole system of charitable uses; that since that time a new system, peculiar to the institutions of the State, has grown up, and the courts of New York will not now enforce charitable trusts not in harmony with the New York system, unless they are as definite as private trusts. Although trustees are certain and capable of taking the legal estate, the trust cannot be established, if there is any uncertainty in respect to the beneficiaries or any discretion in the trustees; thus where a fund was given to executors to be applied by them, according to their judgment, in founding a college in Liberia, it was held that the gift was void for uncertainty in the application of it. *Phelps v. Phelps*, 28 Barb. 121; *Beekman v. People*, 27 Barb. 260; *Beekman v. Bonsor*, 23 N. Y. 290; *Owens v. Mission Soc.*, 14 N. Y. 380; *Yates v. Yates*, 9 Barb. 324; *King v. Rundle*, 15 Barb. 139; *Wilson v. Lynt*, 16 How. (N. Y.) Prac. R. 348; 30 Barb. 124; *Dodge v. Pond*, 23 N. Y. 69; *Goddard v. Pomeroy*, 36 Barb. 546; *Levy v. Levy*, 33 N. Y. 97; *Sherwood v. Amer. Bible Soc.*, 1 Keyes, 566. It is further considered by the court that the Revised Statutes abolish all express trusts except for the purposes specially named, which are four in number, and are active trusts in the interests of private individuals for temporary purposes, and do not include permanent trusts for charitable uses, or for the benefit of classes of persons, or for corporations. *Holmes v. Mead*, 52 N. Y. 339; *Burrill v. Boardman*, 43 N. Y. 263; *Adams v. Perry*, id. 487; *Chamberlain v. Chamberlain*, id. 424; *Leonard v. Bell*, 1 N. Y. Sup. Ct. 608; *Donaldson v. American Tract Soc.*, 1 N. Y. Sup. Ct. Add. 15; *Leferve v. Leferve*, 2

N. Y. Sup. Ct. 330. It is now conceded that the law of charitable uses was not founded upon the statute of Elizabeth; and neither the courts nor the bar of New York understood, for more than half a century, that the statute of 1788 repealed the statute of Elizabeth. And it might well have been assumed, after such a length of time, that the repeal did not extend further than the statute of 1788 itself went, and that if the statute of 1788 repealed the statute of Elizabeth, the system which was independent of it still remained. It would not be becoming to criticise the jurisprudence of a great State upon so important a subject; but the question arises in every mind conversant with this branch of the law, whether the new system, that has taken the place of the old, is more certain in its application and more satisfactory, and better adapted to the wants of a great and growing people. Does the new system carry out the intention of charitable donors with more efficiency than did the old and tried system, which had grown up with time, and had been modified by the wisdom of so many judges, and still satisfies the wants of so many States? Another observation may be made. The cases thus far decided evince great learning, research, and ability; but there seems to be want of confidence in the stability of the system, and a want of agreement among both the lawyers and the judges: so that the whole matter is yet in a transition state. If certainty is an element of safety and security in the law, the attempt to substitute one system for another has as yet only reached the point of rendering both systems uncertain. *Consistory v. Brandon*, 52 Barb. 228; *Chamberlain v. Chamberlain*, 43 N. Y. 424.

In North Carolina, the statute was declared to be in force in its general principles, and courts applied very liberal rules in dealing with this kind of trusts. *Griffin v. Graham*, 1 Hawks, 96; *State v. McGowen*, 2 Ired. Eq. 9; *State v. Gerard*, id. 210. But, since those cases, the courts have declined to apply the rules applicable to public trusts, and have confined themselves to the rules applicable to trusts for private individuals. *Wilson v. McAuley*, 1 Dev. Eq. 276; *Trustees v. Chambers*, 3 Jones, Eq. 253; *Holland v. Peck*, 2 Ired. Eq. 255; *Haywood v. Craven*, 2 Car. L. R. 557; *White v. Att. Gen.* 4 Ired. Eq. 19. Perhaps some of these trusts were too uncertain to be established by the most liberal judicial rules, and certainly it would be hard to convict a trustee of breach of trust in applying a fund for the good of "poor saints." There might be so great a difficulty in determining who were "saints" and "poor," and what should be done for them, in other States as well as North Carolina, that the trust might well fail, although there was a trustee to exercise his discretion in selecting them. *Bridges v. Pleasants*, 4 Ired. Eq. 26; *White v. University*, id. 19. See *Miller v. Atkinson*, 63 N. C. 537.

In Ohio, the statute is in full force, and the general rules of equity applicable to public trusts are applied by the courts. *Perin v. Carey*, 21 How. 465; *Hullman v. Honcomp*, 5 Ohio St. 237; *Zanesville Canal v. Zanesville*, 2 Ohio, 483; *M'Intire's School v. Zanesville*, 9 Ohio, 203;

*Amer. Bible Soc. v. Marshall*, 15 Ohio St. 537; *Urmeys's Ex'rs v. Wooden*, 1 Ohio St. 160.

In Pennsylvania, the statute is not directly in force, and the courts are not confined to the statute for an enumeration of charitable uses; but in other respects the principles of the statute are a part of the common law of the State. In 1855, an act was passed declaring that when gifts are made to religious, charitable, educational, literary, or scientific purposes, in no event whatever shall they revert to the heir, but the courts are to apply them to the purposes for which they were intended. Previous to this statute, the courts had applied most liberal judicial rules to the establishment and regulation of public charities. *Whitman v. Lex*, 17 S. & R. 88; *Wright v. Linn*, 9 Penn. St. 435; *Soochan v. Philadelphia*, 33 id. 9; *Price v. Maxwell*, 28 id. 23; *Pickering v. Shotwell*, 10 id. 23; *Griffiths v. Cope*, 17 id. 96; *Girard v. Philadelphia*, 7 Wall. 1; *McLain v. School Directors*, 51 Penn. St. 196; *Evangelical Asso. App.*, 35 id. 316; *Mission Soc. App.*, 30 id. 425; *Cresson's App.*, id. 437; *Meth. Church v. Remington*, 1 Watts, 218; *Gregg v. Irish*, 9 S. & R. 211; *Browsers v. Fromm*, Add. 365; *McGirr v. Aaron*, 1 Penn. St. 49; *Martin v. McCord*, 5 Watts, 494; *Barr v. Weld*, 24 Pa. St. 84; *Brender v. German Ref. Cong.*, 33 id. 418; *Philadelphia v. Wills*, 3 Rawle, 170; *Cassell's App.*, 3 Watts, 440; *Morrison v. Beirer*, 2 W. & S. 81; *Zimmerman v. Anders*, 6 W. & S. 218; *Magill v. Brown*, Brightly, 347; *Blenon's Estate*, id. 345; *Vidal v. Girard's Ex'rs*, 2 How. 128. In *Hillyard v. Miller*, 10 Penn. St. 326, it was determined that accumulations for charity could not be allowed beyond the legal period; but in *Philadelphia v. Girard*, 45 Penn. St. 9, this point was substantially overruled. *McLean v. Wade*, 41 Penn. St. 266; *Miller v. Porter*, 53 id. 292; *Henderson v. Hunter*, 59 id. 335. *Philadelphia v. Fox*, 6 id. 170. In *Zeisweiss v. James*, 63 id. 465, it was determined that uncertainty in the objects of a trust is no objection, if there are trustees who can select the objects and render them certain; but if there are no trustees to select the objects, the court cannot appoint trustees and clothe them with the power of selection. It was further determined, that an unincorporated society may take under a charitable devise; but that a gift to a corporation to be incorporated, but which might not be incorporated within the time for limiting estates, is void. And so if the gift is to a corporation to be created, but which cannot exist according to the laws of the State, it must fail. It was further determined, that the laws and institutions of Pennsylvania are built on the foundation of reverence for Christianity, and that the religion revealed in the Bible is not to be openly reviled, ridiculed, or blasphemed to the annoyance of sincere believers; and that trusts attempted to be created, tending to that end, are illegal and void.

In Rhode Island, the jurisdiction of the courts is founded upon an old statute very similar to the statute of Eliz., and rules appropriate to charitable trusts where the statute is in force, are applied by the court to such

cases. *Derby v. Derby*, 4 R. I. 414; *Potter v. Thornton*, 7 R. I. 252; *Meeting Street Bap. Soc. v. Hail*, 8 R. I. 240.

In South Carolina, the courts exercise an original jurisdiction over charitable trusts, whether the statute is in force in the State or not, and rules proper for such trusts are applied as in other States. *Att. Gen. v. Jolly*, 1 Rich. Eq. 99; 2 Strob. 379; *Combe v. Brazier*, 2 Des. 431; *Att. Gen. v. Clergy Soc.*, 8 Rich. Eq. 190; *Gibson v. McCall*, 1 Rich. L. 174.

In Tennessee, the court exercises an original jurisdiction over charitable trusts, and the common rules applicable to public charities are approved; but there is a slight uncertainty in their application. *Green v. Allen*, 5 Humph. 170. The later cases, *Franklin v. Armfield*, 2 Sneed, 305, and *Dickson v. Montgomery*, 1 Swan, 348, proceed with more confidence and firmness. The court refers to an extraordinary jurisdiction and power which it may exercise in charity cases. See remarks upon this matter under New Jersey in this note. See also *White v. Hale*, 2 Cold. 77; *Gass v. Ross*, 3 Sneed, 211.

In Texas, the court exercises an original and inherent jurisdiction over charities upon the principles of the statute. *Hopkins v. Upshur*, 20 Tex. 89; *Ball v. Alexander*, 22 Tex. 355; *Paschal v. Acklin*, 27 Tex. 173.

In Vermont, the statute is substantially the law of the State in relation to charitable trusts. *Stone v. Griffin*, 3 Vt. 400; *Burr v. Smith*, 7 Vt. 241; *Penfield v. Skinner*, 11 Vt. 296.

In Virginia, the statute was repealed; and the courts will establish no public trust for a charitable use except it comes within the strict rules of private trusts. This, of course, destroys all trusts in which a trustee has any discretion in selecting the objects of the charity. *Gallego v. Att. Gen.*, 3 Leigh, 451; *Seaburn v. Seaburn*, 15 Grat. 243; *Baptist Association v. Hart*, 4 Wheat. 1; *Wheeler v. Smith*, 9 How. 55; *Carter v. Wolf*, 13 Grat. 301; *Richmond v. Tayloe*, Gil. 336. And see *Venable v. Coffman*, 2 West Va. 310; *Janey v. Latane*, 4 Leigh, 327; *Carpenter v. Miller*, 3 W. Va. 174. See also *Levy v. Com'th*, 23 Grat. 21.

## CHAPTER XXIV.

## TRUSTEES FOR BONDHOLDERS OF RAILWAYS AND OTHER CORPORATIONS.

- § 749. Nature of such trusts.
- § 750. Character of such trusts in England.
- § 751. Character of the mortgages at common law.
- § 752. Where an act of parliament confers the only power of borrowing.
- § 753. Where a person to whom a mortgage is made assigns a part of the mortgage debt.
- §§ 754, 755. Power of corporations to mortgage their general property.
- § 756. The franchise of being a corporation cannot be aliened or mortgaged.
- § 757. Whether the franchise of doing the business of the corporation can be mortgaged.
- § 758. The power to mortgage need not be given in express words.
- § 759. Whether the mortgage embraces property subsequently acquired.
- § 760. General duties of trustees for bondholders.
- § 761. How they may foreclose the mortgage.
- §§ 762, 763. Duties and responsibilities when possession is taken of the mortgaged property.

§ 749. WITHIN the last few years it has become common in this country to create trusts for bondholders. The development of railways has been rapid, and to operate and extend them often requires large sums of money in excess of their capital stock, or their ordinary floating debt. As it is impossible to obtain these large sums in the ordinary course of business from one source and without security, the bonds of the corporation are issued, under authority of the legislature, and sold in the market, and the franchise and property of the corporation conveyed in mortgage to one or more persons in trust to secure the purchasers and holders of the bonds. The bonds may amount to millions of dollars, and be scattered through the country, and even in foreign lands; but the trustees hold the conveyance of the property in trust for all who have the bonds described or referred to in the mortgage. The corporation itself issues the bonds, and promises to pay the principal and interest at a time named. So long as the



corporation pays the interest or the principal of the bonds, as agreed, the trustees have little or nothing to do. The general principles of the law of trusts apply to them.<sup>1</sup> They hold the security in trust for the bondholders, as *cestuis que trust*; and they must act in good faith, and for the best interests of all. They must take care that the property is not wasted, or depreciated, or rendered worthless as security. They should not acquire interests, or put themselves in positions or relations, which are antagonistic or hostile to the interests of the bondholders. Doubtless they can purchase the bonds for which the mortgage stands as security in the open market: but they could not go among the bondholders and solicit the purchase of the bonds; for, holding the security for the bonds in their own hands, their position and influence would be such, and the danger of fraud so great, that a court of equity would not allow the bargain to stand. Their duty in all such respects would be governed by the general rules that affect all trustees, modified to meet the exigencies of the case. (a) It is only where there is a default made by the corporations in the payment of the bonds or the interest, and it is necessary for the bondholders to have recourse to the mortgage security, that their peculiar duties begin.<sup>2</sup>

§ 750. The usual practice in England is to mortgage only the tolls, accruing profits, or future calls of the corporation.<sup>3</sup>

If the act of parliament only authorizes such a mortgage, or if the deed itself extends only to the tolls, profits, and future calls, receivers may be appointed to receive the tolls,

<sup>1</sup> *Sturges v. Knapp*, 31 Vt. 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> 8 and 9 Vict. c. 16.

(a) See *Jones on Corporate Bonds and Mortgages*, ch. 10. The legislature may legalize municipal bonds informally issued in aid of railroads. *Rogers v. Keokuk*, 154 U. S. 546. Authority given to a municipal corporation to subscribe for stock in a railroad does not empower it to issue bonds for the payment thereof. *Katzenberger v. Aberdean*, 121 U. S. 172; *Norton v. Dyersburg*, 127 id. 160.

profits, or other income of the corporation; but an action of ejectment cannot be maintained for the possession against the corporation.<sup>1</sup> But, of course, there may be a mortgage authorized and made which will give the mortgagee a right to the possession of the property; in such case the mortgagee entitled to the possession may maintain an action against the mortgagor, or subsequent mortgagees.<sup>2</sup>

§ 751. If a mortgagee of the tolls and income is in possession of the property of the corporation, receiving the tolls and income, he will hold the receipts in trust for the holders of the bonds, claims, or debts for which the mortgage was made as security; and upon payment of all such claims or debts he will hold the income in trust for subsequent incumbrancers.<sup>3</sup> So where the mortgage is of an aliquot part of the income, the trustees will receive the toll or income for those entitled; but no action at law can be maintained against them for such moneys. They can be called to an account only in equity.<sup>4</sup> It sometimes happens that a mortgage of the tolls and income contains a power of sale of the whole undertaking. If a sale is made under such power in a first mortgage, it is a bar to all subsequent mortgages; and subsequent mortgagees can only claim the surplus in the hands of the first mortgagee after paying off all the claims for which the first mortgage stands as security.<sup>5</sup>

§ 752. Where the act of parliament confers upon corporations their only power of borrowing, they can borrow in no other manner;<sup>6</sup> and if the act of parliament authorizes a

<sup>1</sup> *Fairtitle v. Gilbert*, 2 T. R. 169; *Banks v. Booth*, 2 B. & P. 219; *Myatt v. St. Helen's and Runcorn Gap Railw.*, 2 Q. B. 364; 2 Railw. C. 756. See comments of Lord Chelmsford, in *Wickham v. New B. & Canada Railw.*, 12 Jur. (N. S.) 34.

<sup>2</sup> *Thompson v. Lediard*, 4 B. & Ad. 137; *Watton v. Penfold*, 3 Q. B. 757; *Levy v. Horne*, *id.* 757.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Pardoe v. Price*, 11 M. & W. 427; 13 M. & W. 267; 16 M. & W. 451.

<sup>5</sup> *South-Eastern Ry. Co. v. Jortin*, 31 Law Times, 44.

<sup>6</sup> *Chambers v. Manchester & Milford Ry.*, 10 Jur. (N. S.) 700; *Lowndes v. Garnett & Mosely Co.*, 33 L. J. Ch. 418.

mortgage of the tolls or income, or of the corporate property, and a mortgage is executed in conformity with the act, no power is given to enter into personal covenants; therefore no action lies against the company upon the deed to recover the money loaned, but proceedings are confined to remedies against the property or tolls mortgaged.<sup>1</sup> But if there is no restriction in the act of parliament upon the power of borrowing, and the company has the usual power of borrowing money, and of securing payment by personal covenants, actions will lie against the corporation to recover the money,<sup>2</sup> (a) and bondholders may maintain actions upon the covenants in the bonds.<sup>3</sup>

§ 753. If a mortgage is made to one person to secure several notes or bonds made to him, and the mortgagee assigns the notes or bonds to different persons, but continues to hold the mortgage security in his own name, he will hold it in trust for the several persons to whom he has assigned the mortgage notes, bonds, or other evidences of the debt due to him. So if a mortgage of a railway is made to a person to secure a large number of bonds given to him, and he assigns or sells the bonds to various persons, he becomes a trustee, by equitable construction, of the mortgage security for the several holders of the bonds, and such constructive trust is governed by the common rules that apply to such

<sup>1</sup> *Furness v. Caterham Ry.*, 25 Beav. 614; 27 Beav. 358; *Pontet v. Basingstoke Canal Co.*, 3 Bing. N. C. 433; *Long v. Mathieson*, 2 Gif. 71.

<sup>2</sup> *Hill v. Manchester Water Works*, 2 B. & Ad. 544; *Balcrow v. Herne Bay Pier Co.*, 16 Eng. L. & Eq. 159; 1 El. & Bl. 74; *Hart v. Eastern Union Ry.*, 8 Eng. L. & Eq. 544; 14 Eng. L. & Eq. 535; 7 Exch. 246; *Perkins v. Pritchard*, 3 Ry. Cas. 95; *Bryon v. Metropolitan Saloon Omnibus Co.*, 3 De G. & J. 123.

<sup>3</sup> *Price v. Great Western Railw.*, 16 M. & W. 244; *White v. Carmarthen, &c. Ry.*, 1 H. & M. 786.

(a) See *Ex parte Watson*, 21 Q. B. D. 301; *Gordillo v. Weguelin*, 5 Ch. D. 287. In England, a debenture, which charges the company's undertaking, and all its present and future property, is not a charge upon its uncalled capital. *In re Russian Spratts' Patent*, [1898] 2 Ch. 149.

transactions. But such mortgages are not within the statutes in force in many States in relation to mortgages of railways in trust, as security for bonds to be issued by the corporation. In the case first stated, the bondholders cannot appoint a new trustee, nor have they any statute powers over such trust; but they must apply to the courts, and take such action, for the enforcement of it, as is necessary in the ordinary case of a private trust.<sup>1</sup>

§ 754. In the United States, the power of corporations to mortgage their property has been much considered. The discussions in courts have been prolonged upon the question, What can trustees take under a mortgage by a corporation? It seems to be well established, that corporations have a general right and power to mortgage their real and personal property to secure the payment of the purchase-money of such property,<sup>2</sup> or to secure their general debts.<sup>3</sup> And even if the charter of a railway or other corporation provides that the money to construct the road or other works of the corporation shall be raised by subscription or by the sale of a determined number of shares, or that new shares may be issued for additional funds, or that the shares shall not be assessed beyond one hundred dollars per share, the power of mortgaging is not excluded, but the corporations may raise money by a mortgage to trustees or otherwise.<sup>4</sup> The mort-

<sup>1</sup> *In re* Bondholders of the York and Cumberland R. R. Co., 50 Maine, 565.

<sup>2</sup> *Susquehanna Bridge Co. v. General Ins. Co.*, 3 Md. 30; *Lucas v. Pitney*, 3 Dutch. 221; *White v. Carmarthen and Cardigan Ry.*, 33 L. J. Ch. 93; *Mobile & Cedar Point Ry. v. Tolman*, 15 Ala. 472; *Joy v. J. & M. Plank R. Co.*, 11 Mich. 155; *Australian Auxil. S. Clipper Co. v. Mounsay*, 4 K. & J. 733; *Scott v. Colburn*, 26 Beav. 276.

<sup>3</sup> *Gordon v. Preston*, 1 Watts, 385; *In re Magdalena Steam Nav. Co.*, 1 John. (Eng.) 690; *Coe v. Columbus, &c. Railw.*, 10 Ohio St., 372, 412; *Coe v. Peacock*, 14 id. 187; 23 How. 117; *Bardstown & Louisville Ry. v. Metcalfe*, 4 Met. (Ky.) 199; *Jackson v. Brown*, 5 Wend. 590; *De Ruyter v. St. Peter's Church*, 2 Comst. 238; *Central Bridge v. Baily*, 8 Cush. 319; *Jowitt v. Lewis*, 4 Lit. 160; *Enders v. Board of Public Works*, 1 Grat. 364.

<sup>4</sup> *Union Bank v. Jacobs*, 6 Humph. 515; *Junction Railw. v. Ruggles*, 7 Ohio St. 1.

gage in such cases must be executed according to the rules and by-laws of the corporation, if there are any, or it will be void.<sup>1</sup>

§ 755. Upon general principles, as before stated, a corporation, being the absolute owner of its property, may sell, convey, and mortgage it. Such rights are among the essential incidents to property, and they are inherent in property whether owned by corporations or private individuals. But when the legislature of a State charters corporations for public purposes, and authorizes them to take lands and build roads, to run trains of cars and receive tolls, such corporations undertake, in return for the privileges granted, to perform the duties for which they are chartered. The general right and ownership of property carries with it the right to sell it, or to convey it in mortgage, which may become an absolute sale by foreclosure. If the corporation makes a mortgage of all its property simply, without naming its franchise, can the mortgagee by foreclosure remove the property to another place, and prevent the corporation from performing its duties, or can the mortgagee use the property as the corporation used it? It is apparent that the removal of the property to another place would destroy the larger part of its value, as well as deprive the corporation of the power of exercising its franchise.

§ 756. It is said that the franchise of a corporation consists of two parts, or rather of two franchises distinct and independent of each other in their nature: the one is the franchise to be a corporation, to have a legal entity, a corporate name, and the right and power of suing and being sued, and of performing other acts requiring a legal existence as an independent being; the other is the franchise or privilege of doing a particular business in a certain manner, and of collecting or receiving tolls, fees, or compensation for doing such acts. It is conceded by all, that the right, privilege,

<sup>1</sup> *Gordon v. Preston*, 1 Watts, 385; *Richards v. Merrimack, &c. R. Co.*, 44 N. H. 135.

or franchise to be a corporation cannot be sold, mortgaged, or assigned to any other person or body of persons. The State having granted this privilege to a particular body, it cannot be transferred to another body without the sanction of the power that granted it.<sup>1</sup>

§ 757. It is well established that a corporation, like an individual, may mortgage its real and personal property, and the mortgagees acquire by foreclosure the absolute ownership of such property. If such property is disconnected from the general purposes of the corporation, no questions can arise. The mortgagees or trustees can enter upon and occupy and improve the property in the same manner that other property is improved. But if the property is essential to the business of the corporation, can the mortgagees or trustees enter and take such property and remove it, so far as it is personal, and sell the real estate? Or can they remove the rails and superstructure of the road-bed, and take away the power of the corporation to perform its duties to the public? If the mortgagees cannot do these things, can

<sup>1</sup> *Bowman v. Walker*, 2 McLean, 393; *Bardstown, &c. Railw. v. Metcalfe*, 4 Met. (Ky.) 200; 2 Redf. on Railw. 514 (3d ed.) n.; *Coe v. Columbus, &c. Ry.*, 10 Ohio St. 372; *State v. Boston, &c. Ry. Co.*, 25 Vt. 433; *Hall v. Sullivan Railw. Co.*, 21 Law Rep. 138; 2 Redf. on Railw. 517; *Com'th v. Smith*, 10 Allen, 456. Mr. Justice Curtis in *Hall v. Sullivan Ry. Co.*, *ubi supra*, said: "Among the franchises of the company is that of being a body politic with rights of succession of members, and of acquiring, holding, and conveying property, and suing and being sued by a certain name. Such an artificial being only the law can create; and, when created, it cannot transfer its own existence into another body; nor can it enable natural persons to act in its name, save as its agents, or as members of the corporation acting in conformity with the modes required or allowed by its charter. The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law by some positive provision has made it so, and pointed out the modes in which such sale and transfer may be affected. But the franchises to build, own, and manage a railway, and to take tolls thereon, are not necessarily corporate rights: they are capable of existing in and being enjoyed by natural persons, and there is nothing in their nature inconsistent with their being assignable: *Peter v. Kendall*, 6 B. & C. 703; *Com. Dig. Grant, C.*

they use the property in the position in which it is placed? Can they operate the railway? Can they run trains of cars, carry passengers and freight, and receive fares or tolls? If the legislature has expressly authorized the corporation to execute a mortgage of all its property, including the franchise of operating the railway and receiving tolls, there can be little or no trouble in a legal point of view; but if the mortgage is executed without the special authority of the legislature, can the corporation mortgage its franchise to operate its road or receive tolls, and what are the rights and powers of trustees under such mortgages? On the one side, the opinion has been expressed that a railway corporation may mortgage all its property, including its road-bed and the superstructure and the franchise of operating or using it as a railway, although the legislature granted no such power to the corporation in terms.<sup>1</sup> On the other hand, the opinion has been very largely entertained that a corporation cannot transfer the franchise of operating its road to another person or corporation, and thus escape the burden assumed by it towards the public.<sup>2</sup> The preponderance of authority would

<sup>1</sup> *Allen v. Montgomery Ry.*, 11 Ala. 437; *Mobile & Cedar Point R. Co. v. Tolman*, 15 Ala. 472; *Pollard v. Maddox*, 22 Ala. 321; *Dunham v. Isett*, 15 Iowa, 284; *Hall v. Sullivan R. Co.*, 21 Law Rep. 138; *Pierce v. Emery*, 32 N. H. 484; *Miller v. Rutland, &c. Railw.*, 36 Vt. 452; *Bowman v. Walker*, 2 McLean, 393; *Dinsmore v. Racine, &c. Railw.*, 12 Wis. 649; *Platt v. New York Railw.*, 26 Conn. 544; *Union Bank v. Jacobs*, 6 Humph. 515; *Macon, &c. R. Co. v. Parker*, 9 Ga. 377; *Briggs v. Terrell*, 12 Ired. 1; *Watertown v. White*, 13 Mass. 477; *Fay, Petitioner*, 15 Pick. 243; *Felton v. Deal*, 22 Vt. 170; *McCauly v. Givens*, 1 Dana, 261; 1 *Greene (Iowa)*, 498; *Clark v. Washington*, 12 Wheat. 40; *Bingham v. Weiderwax*, 1 Comst. 509; 2 *Kent*, 305, 307; 1 *Redf. Railw.* 588; *Enfield Toll Bridge v. Hartford, &c. Railw.*, 17 Conn. 40.

<sup>2</sup> *Com'th v. Smith*, 10 Allen, 456; *Opinion of Justices*, 9 Cush. 611; *Salem Mill Dam v. Ropes*, 6 Pick. 32; *Treadwell v. Salisbury Mills*, 7 Gray, 404; *Whittenton Mills v. Upton*, 10 Gray, 582; *Arthur v. Commercial, &c. Bank*, 9 Sm. & M. 394; *State v. Commercial Bank*, 13 Sim. & M. 569; *Richards v. Merrimack, &c. Railw.*, 44 N. H. 127; *Atkinson v. Marietta, &c. R. Co.*, 15 Ohio St. 21; *State v. Mexican Gulf Railw.*, 3 Rob. (La.) 513; *Hall v. Sullivan R. Co.*, 21 Law Rep. 138; *Pierce v. Emery*, 32 N. H. 484; *Tippetts v. Walker*, 4 Mass. 495; *Worcester v.*

seem to be against the power of a corporation to convey its franchise in mortgage, unless specially authorized to do so by the legislature. It is, however, worthy of observation that there is no case where the franchise of a corporation has been decreed to pass to trustees by mortgage of its franchise, not authorized by the legislature either in terms or by implication; and, on the other hand, there is no case where a mortgage of the franchise to trustees has been held invalid by reason of a want of power in the corporation to convey its franchise.

§ 758. The grant of power or authority to a corporation to mortgage its franchise need not be contained in its charter, as a subsequent act of the legislature will confer full power. And such grant of power is not required to be made in express terms. It is sufficient if the sovereign power assents to such mortgage. If, therefore, the mortgage is recognized by the legislature in any way as an existing and valid mortgage, it will be sufficient.<sup>1</sup> So a right of way may be mortgaged, and, upon default of payment, may be sold and

Western Railw., 4 Met. 564; *Troy, &c. R. Co. v. Kerr*, 17 Barb. 581; *States v. Rives*, 5 Ired. 297; *Winch v. R. Co.*, 13 Eng. L. & Eq. 506; 5 De G. & Sm. 562; 7 Railw. Cas. 384; *South Yorkshire, &c. R. Co. v. Great Northern Ry.*, 19 Eng. L. & Eq. 513; 3 De G., M. & G. 576; *Beman v. Rafford*, 6 Eng. L. & Eq. 106; 1 Sim. (N. s.) 550; *Wheelock v. Moulton*, 15 Vt. 519; *Bennington Iron Co. v. Isham*, 19 Vt. 230; *Shrewsbury, &c. Railw. v. London & N. W. Ry.*, 21 Eng. L. & Eq. 319; 4 De G., M. & G. 115; 6 H. L. Ca. 113. It has been determined, in a great number of cases, that the franchise of a corporation cannot be seized, sold, and transferred on execution against the corporation. *Com'th v. Smith*, 10 Allen, 456; *States v. Rives*, 5 Ired. 267; *Seymour v. Milford, &c. Railw.*, 10 Ohio, 476; *Winchester, &c. Turnpike Co.*, 5 B. Mon. 1; *Ammont v. New Alexandria, &c. Turnpike Co.*, 13 S. & R. 212; *Leedom v. Plymouth R. Co.*, 5 W. & S. 266; *Susquehanna Canal Co. v. Bonham*, 9 W. & S. 27; *Tippetts v. Walker*, 4 Mass. 596. But a statute may authorize an execution to be levied on such franchise. *Mass. Gen. Stat. c. 68, §§ 26-34*; *Com'th v. Tenth Mass. Turn.*, 5 Mass. 509.

<sup>1</sup> *Shaw v. Norfolk County R. Co.*, 5 Gray, 179; *Hall v. Sullivan, &c. R. Co.*, 21 Law Reporter, 138; *Pierce v. Emery*, 32 N. H. 484; *Richards v. Merrimack River Railw.*, 44 N. H. 127; *Chapin v. Vermont, &c. Ry.*, 8 Gray, 575.



transferred; but the original purpose for which such right of way was granted cannot be defeated.<sup>1</sup>

§ 759. When a mortgage to trustees is made by a railway corporation of its franchise and all its property, it frequently becomes an interesting question to determine what is embraced in the mortgage. In some cases, it has been determined that the rolling-stock of a railway, such as cars and locomotives, is accessory to the road-bed, station-houses, and franchise, and belongs to the real estate or road-bed of the corporation as fixtures, and cannot be seized, on execution against the company, and sold or removed.<sup>2</sup> In other cases, it has been held that where a mortgage of the franchise and property of a railway was authorized, and the deed in terms included all the property then owned by the company, or thereafter to be acquired, a creditor could not levy an execution upon property acquired after the execution of the mortgage, if such property was necessary to the use and enjoyment of the road and the other property accessory to it; and it was referred to a master to hear and report whether the property seized was necessary to the operation of the road.<sup>3</sup> In other cases, the personal property of a railway corporation, although necessary for the operation of the road, is held to be mere personal property, in no way attached or accessory to the road-bed or to the franchise, and that such personal property can be seized on execution, and sold like any other personal property, or like the personal property of any other owner.<sup>4</sup> But, however this may be

<sup>1</sup> *Junction R. Co. v. Ruggles*, 7 Ohio St. 1.

<sup>2</sup> *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. 484; *Palmer v. Forbes*, 2 Ill. 300; *Hunt v. Bullock*, 23 Ill. 320; *Pennock v. Coe*, 23 How. 117; *State v. Northern R. Co.*, 18 Md. 193; *Farmers' Loan, &c. Co. v. Commercial Bank*, 11 Wis. 207.

<sup>3</sup> *Ludlow v. Hurd* (Superior Court, Cincinnati), 2 Redf. on Railw. 542-545; *Willink v. Morris Canal, &c. Co.*, 3 Green, Ch. 377; *Pierce v. Emery*, 32 N. H. 484; *Coe v. Pennock*, 6 Am. Law Reg. 27; 23 How. 117; *Ammont v. New Alexandria, &c. Turnp. Co.*, 13 S. & R. 212; *Phillips v. Winslow*, 18 B. Mon. 431; *Londenschlager v. Benton*, 3 Grant's Cas. 384.

<sup>4</sup> *Stevens v. Buffalo & N. Y. R. Co.*, 31 Barb. 590; *Beardsley v. Ontario Bank*, id. 619.

finally determined, there seems to be no reason, upon principle, why a mortgage to trustees may not embrace all property subsequently acquired, if such property is absolutely essential to the operation of the road. The rule at law, that property not at the time owned by a mortgagor cannot be mortgaged by him, is a technical rule; and there is no reason why a railway mortgage to trustees for bondholders should not cover and embrace all the property necessary for the business of the corporation, although such property may have been acquired by the corporation after the date of the mortgage. Consequently it has been held, whenever the question has arisen, that, if the deed embraced subsequently acquired property, such property passed to the trustees.<sup>1</sup>

§ 760. Trustees for bondholders are governed by the general rules that govern trustees in the ordinary performance of the duties of a trust. They must consult the wishes and interests of the *cestuis que trust* or bondholders, and they may be removed, or enjoined, or ordered to proceed in the performance of their duties, as the exigencies of the case may require. Thus, if they refuse to take steps to foreclose the mortgage after the bonds have matured, they may be removed, and others appointed in their place.<sup>2</sup> But courts of equity may refuse to give the railway and its property into the hands of the trustees for the bondholders, or to appoint receivers, although there is a breach of the terms of the

<sup>1</sup> *Phillips v. Winslow*, 18 B. Mon. 431; *Howe v. Freeman*, 14 Gray, 566; as to the point of after-acquired property. *Coe v. Peacock*, 14 Ohio St. 187; *Coe v. Columbus, &c. Railw.*, 10 id. 372; *Coe v. Knox Co. Bank*, id. 412; *Coe v. McBrown*, 22 Ind. 252; *Pierce v. Emery*, 32 N. H. 484; *State v. Northern Ry. Co.*, 18 Md. 193; *First Mortgage Bondholders v. Maysville, &c. Ry.*, 9 Am. Railw. Times, No. 31; *Smith v. Atkins*, 18 Vt. 461. A somewhat different doctrine was held in *Beardsley v. Ontario Bank*, 31 Barb. 619; *Stevens v. Buffalo & N. Y. R. Co.*, id. 590. And see *State v. Somerville, &c. R. Co.*, 4 Dutch. 21; *State v. Mexican Gulf R. Co.*, 3 Rob. (La.) 513; *Buffalo R. R. Co. v. Lampson*, 47 Barb. 533; *Williamson v. New Albany, &c. R. Co.*, 1 Bissell, 207.

<sup>2</sup> In *Matter of Mechanics' Bank*, 2 Barb. S. C. 446.

mortgage, and a default in paying the interest upon the bonds. If there has been such a course of dealing between the bondholders and trustees on the one side, and the railway company on the other, or if there are any other circumstances which render a sale or possession by the trustees inequitable or improper, or hazardous to the best interests of all parties, the court will refuse to interfere, but will make such orders as will protect the equitable rights of the parties.<sup>1</sup> (a)

§ 761. If the deed to the trustees is a mere trust for sale in case the bonds are not paid according to their terms, the trustees can do nothing but sell the property at public or private sale as the provisions of the trust-deed direct;<sup>2</sup> but if the trust-deed is a mortgage of the road-bed franchise and other property, the trustees may take possession of the property and foreclose the mortgage by strict foreclosure, according to the rules of law, although the mortgage contains a power of sale and full directions as to the manner in which the trustees shall proceed in the sale. In this respect, the mortgage of a railway with its franchise and other property does not differ from mortgages of real estate. The power to sell contained in the deed does not exclude other modes of foreclosure provided by law, but is in addition to them; and trustees may proceed to foreclose in the manner which they may judge to be most beneficial to the interests committed

<sup>1</sup> *Williamson v. New Albany, &c. R. Co.*, 1 Bissell, 207.

<sup>2</sup> *Jenkins v. Row*, 11 Eng. L. & Eq. 297; 5 De G. & S. 107; 16 Jur. 1131.

(a) A person who bids at a foreclosure sale, under an agreement with bondholders to hold the property in trust on being paid the amount of his bid, holds his title in trust for the bondholders if they perform their part of the agreement. *Cushman v. Bonfield*, 139 Ill. 219. In *New York*, trustees under a mortgage for bondholders are allowed compensation for their services at the rate usually awarded to executors and administrators. *Woodruff v. New York, &c. R. Co.*, 129 N. Y. 27. No fiduciary relation exists between a lender of money to a corporation and its bondholders who waived their lien to secure the loan. *Brown v. Anderson*, 104 Ga. 30.

to their charge. So, if the deed provides that they shall sell in a certain manner, they may apply to the court for a decree of sale.<sup>1</sup> If the deed gives possession to the mortgagor until default, and that on default the trustees might enter and manage, dispose of the lands, etc., then until default and entry the trustees cannot make a contract to sell the property.<sup>2</sup>

§ 762. It sometimes becomes the duty of trustees to take possession of the mortgaged property and franchise of a railway, and to operate and use the same for the accommodation of the public, and for the benefit of the bondholders, until a sale can be effected to another corporation authorized to take the property; or until the bondholders can be organized into a body capable of managing such an interest. In such cases, the trustees will be subject to all the liabilities of carriers of passengers and freight, and in case of loss or damage by accidents, they will be in the same situation as any other owners and managers of a railroad. This rule is carried to the extent of making receivers appointed by the court liable for such losses as other managers of railways are responsible for. There can be no other rule, since persons having no control can be guilty of no negligence. If, therefore, redress must be had anywhere, it must be had against those who have the management and direction of the business, and who may be guilty of neglect or carelessness.<sup>3</sup>

§ 763. Notwithstanding the liabilities thus assumed by trustees for bondholders, if they accept the office they must

<sup>1</sup> *Hall v. Sullivan R. Co.*, 21 Law Rep. 138; *Shaw v. Norfolk Co. R. Co.*, 5 Gray, 162; *Chapin v. Vermont & Mass. R. Co.*, 8 Gray, 575; *Balfe v. Lord*, 2 D. & W. 480; *Slade v. Rigg*, 3 Hare, 35; *Wayne v. Hanham*, 4 Eng. L. & Eq. 147; 9 Hare, 62; 15 Jur. 506; *Croton, &c. Co. v. Ryder*, 1 Johns. Ch. 611; *Newberg, &c. Co. v. Miller*, 5 Johns. Ch. 111; *Boston, &c. Co. v. Boston, &c. R. Co.*, 16 Pick. 625.

<sup>2</sup> *Foster v. Boston*, 133 Mass. 143, 150.

<sup>3</sup> *Barter v. Wheeler*, 49 N. H. 32; *Rogers v. Wheeler*, 2 Lansing, 486; 43 N. Y. 598; *Lamphear v. Buckingham*, 3 Conn. 237; *Sprague v. Smith*, 29 Vt. 421; *Paige v. Smith*, 99 Mass. 395; *Blumenthal v. Brainard*, 38 Vt. 408; 1 Chitty, Plead. 38; *Jones v. Seligman*, 81 N. Y. 149.

perform the duties of the trust. When they consent to accept a conveyance or mortgage in trust, they take the office with the possibility of being called upon to perform such duties. They must take care that the security is not depreciated or destroyed by a stopping of the operations of the corporation; and courts of equity will compel them to take such steps as the safety of the bondholders requires. On the other hand, the court will sustain any reasonable arrangement that they make for continuing the operations of the corporation, and for the security of the bondholders; as, where they make a lease to a connecting road, or to other persons experienced in such matters, and capable of running a railroad.<sup>1</sup>

<sup>1</sup> *Burges v. Knapp*, 25 Vt. 1.

## CHAPTER XXV.

## TRUSTEES FOR SALE.

- § 764. Trustees may not sell without an express or implied power.
- § 765. Character of powers to sell.
- § 766. Form of such powers.
- § 767. A power of sale is not a "usual" power.
- §§ 768, 769. The extent of such powers.
- § 770. How such powers are to be executed.
- §§ 771-773. Within what time such powers may be executed.
- § 774. In what manner trustees may sell.
- § 775. Tenant for life as agent of the trustees.
- § 776. Rights of the tenant for life.
- §§ 777, 778. Where they are to sell with the consent of the *cestui que trust* or tenant for life.
- § 779. Cannot delegate the power of sale.
- §§ 780, 781. Whether they may sell at private sale or at auction.
- § 782. What notice must be given.
- §§ 783-785. The power must be exercised as given.
- § 786. As to conditions of the sale.
- § 786 a. Whether sale may be on credit
- § 787. Who may make a good title.

§ 764. A TRUSTEE is seldom justified in selling the trust estate without an express or implied authority conferred upon him by the instrument of trust. (a) If no power of sale is contained in the instrument, courts of equity, upon cause shown, may decree a sale. In such case all parties in interest should have notice, and parties not *sui juris* should have guardians *ad litem* appointed.<sup>1</sup> Any form of instrument which imposes duties on the trustee which he cannot perform without a sale will necessarily create a power of sale in the trustee, as land is given to a trustee to pay the debts of the grantor.<sup>2</sup> If the instrument of trust contains an ex-

<sup>1</sup> Bush v. Bush, 2 Duv. 269.

<sup>2</sup> Cherry v. Greene, 115 Ill. 591.

(a) As to sales and conveyances valuable note to Tyler v. Herring by trustees, see the extended and (Miss.), 19 Am. St. Rep. 263, 266.

press or implied power, the trustee may enter into contracts of sale without the sanction of the court;<sup>1</sup> (a) and if the trustee is authorized to convey the estate to the *cestui que trust*, such conveyance will be valid, although there is a gift over in case the *cestui que trust* dies before the termination of the trust;<sup>2</sup> but if the trust is before the court by a bill filed for its execution, the whole matter of the trust is within its jurisdiction, and the trustee cannot sell without the sanction of the court, even if the instrument of trust gives him an express power.<sup>3</sup> But if the cause is before the court for the single purpose of determining the validity of a previous sale, and such sale is set aside, the trustees may make a new sale without a special order.<sup>4</sup> It is always the duty of the trustee to sell no more of the trust property than is necessary to satisfy the trust. He may sell when the owner so requests, or when his interests require it, if discretionary power of sale has been given by him to the trustee, but he must not go beyond these sanctions.<sup>5</sup>

§ 765. The power of sale given to trustees is either appendant to the legal estate, and takes effect out of it; or it is a mere collateral authority, unaccompanied with any interest in the property.<sup>6</sup> (b) As, where a testator devises lands

<sup>1</sup> Bath v. Bradford, 2 Ves. 590; Low v. Brinnan, 19 Iowa, 193.

<sup>2</sup> Sellew's App., 36 Conn. 186, 196.

<sup>3</sup> Walker v. Smallwood, Amb. 676; Raymond v. Webb, Lofft, 66; Drayson v. Pocock, 4 Sim. 283; Culpepper v. Aston, 2 Ch. Cas. 116.

<sup>4</sup> Reeside v. Peter, 35 Md. 221.

<sup>5</sup> Curry v. Hill, 18 W. Va. 370.

<sup>6</sup> Stafford v. Buckley, 2 Ves. 179; Warneford v. Thompson, 3 Ves. Jr.

(a) The trustee has power to bind himself and the trust estate by contract to make any sale which he has power to execute. Shannon v. Bradstreet, 1 Sch. & Lef. 52, 59; Lowe v. Swift, 2 B. & B. 529, 535; Clarke v. Moore, 1 Jon. & Lat. 723, 727; Judge v. Pfaff, 171 Mass. 195. A sale may be ordered contrary to the donor's plan in cases of strict necessity. See Johns v. Johns, 172 Ill. 472; Goad v. Montgomery, 119 Cal. 552; Mayall v. Mayall, 63 Minn. 511; Smith v. Smith, 118 N. C. 735. (b) See Headen v. Quillian, 92 Ga. 220; Henderson v. Williams, 97 Ga. 709. A trustee who has not power to convey in fee simple can-

to his executors or trustees to sell, the lands pass to them coupled with the power to sell; but if he directs that his *executors shall* sell the lands, they take a mere naked power to sell, and the freehold descends to the heir to be divested by the execution of the power.<sup>1</sup> So if there is no direct gift of the land to the executors or trustees, vesting the title in them, but a simple devise of the land to be sold by the executors, the land descends to the heir, and the executors have but a naked power. In all such cases, the heirs are entitled to the rents and profits until the power is executed, and their title divested.<sup>2</sup> The same rule applies where a trustee is the devisee.<sup>3</sup> If the power to sell or appoint is in gross, or

513; *Forbes v. Peacock*, 11 Sim. 152; *Bolton v. Jenks*, 6 Rob. (N. Y.) 166; *Reid v. Gordon*, 35 Md. 184; *Prather v. McDowell*, 8 Bush, 46.

<sup>1</sup> Year Book, 9 Hen. VI. 13 b; 24 b; Litt. §-169; Co. Litt. 113 a; 181 b; *Howell v. Barnes*, Cro. Car. 382; *Yates v. Compton*, 2 P. Wms. 308; *Bergen v. Rennall*, 1 Caines Cas. 16; *Jackson v. Schaubert*, 7 Cow. 187; *Peck v. Henderson*, 7 Yerg. 18; *Peter v. Beverly*, 10 Pet. 532; 1 How. 132; *Ferebere v. Proctor*, 2 Dev. & Bat. 439; 1 Ired. Eq. 143; *Jackson v. Burr*, 9 Johns. 104; *Tainter v. Clark*, 13 Met. 220; *Haskell v. House*, 3 Brevard, 242; *Zebach v. Smith*, 3 Bin. 69; *White v. Howard*, 52 Barb. 294.

<sup>2</sup> *Thompson v. Gaillard*, 3 Rich. 418; *Allen v. Dewitt*, 3 Comst. 276; *Bradshaw v. Ellis*, 2 Dev. & B. Eq. 20; *Lindenberger v. Matlock*, 4 Wash. C. C. 278; *Marsh v. Wheeler*, 2 Edw. Ch. 156; *Taylor v. Benham*, 5 How. 269; *Braman v. Stiles*, 2 Pick. 474; *McKnight v. Winsor*, 38 Mo. 132; *White v. Howard*, 52 Barb. 294; *Chamberlain v. Taylor*, 105 N. Y. 185. A trust to executors merely to mortgage is good in New York only when for the benefit of legatees or to discharge a burden from the land (1 R. S. 728, § 55), and such trusts even when valid are only powers, and do not pass the estate to the trustees, or suspend the right of alienation, or prevent the vesting of the property in the heirs or devisees. *Weeks v. Cornwall*, 104 N. Y. 325.

<sup>3</sup> *Schwartz's Estate*, 14 Penn. St. 49; *Guyer v. Maynard*, 6 Gill & J. 420. In Pennsylvania, the rule is changed by statute 1834: *Purdon*, Dig. 283; and a power of sale vests the title in the trustee or executor, and he may collect the rents. *Carpenter v. Cameron*, 7 Watts, 51; *Cobb v. Bidle*, 14 Penn. St. 444; *Blight v. Ewing*, 26 id. 135. In New York, the rule is established the other way, unless they are specially authorized to take

not create a permanent easement in *ington & W. R. Co.*, 122 N. C. the trust estate. *Narron v. Wil-* 856.



belongs to a person having an interest in the estate, such person may relinquish it; but if it is collateral simply, the donee of the power cannot extinguish it.<sup>1</sup>

§ 766. No particular form of words is necessary to create a power of sale. Any words which show an intention to create such power, or any form of instrument which imposes duties upon a trustee that he cannot perform without a sale, will necessarily create a power of sale in the trustee.<sup>2</sup> Thus an assignment in trust to pay debts will necessarily imply a power of sale, though none is given in words.<sup>3</sup> (a) A devise and direction to divide and pay over the shares to legatees, where a division is impracticable, implies a power to sell. A mere direction to divide is not enough: there must be some further active duty to perform.<sup>4</sup> So any form

the rents and profits. Rev. Stat. pt. ii. c. 1, tit. 2, art. 2, § 56; *White v. Howard*, 52 Barb. 294; *Ford v. Belmont*, 7 Rob. 97; *Bolton v. Jenks*, 6 Rob. 166; *Pennoyer v. Shelden*, 4 Blatch. 316. In all the United States, there are provisions for sale of real estate by administrators and executors for payment of debts and legacies by application to courts of probate; and so guardians may sell by decree of probate courts. In all these cases, the heirs, devisees, or wards hold the lands until the decree of the court is executed by a sale. Mr. Kent seems to think that the distinction between a devise of land to a trustee to sell, and a devise of a power to a trustee to sell land, is shadowy. 4 Kent, 321, n.

<sup>1</sup> *Norris v. Thompson*, 4 Green, Ch. 314; *Smith v. Death*, 5 Madd. 317; *Hillyard v. Miller*, 10 Penn. St. 326; *Albany's Case*, 1 Rep. 111; *West v. Berry*, 1 R. & M. 436; *Miles v. Knight*, 12 Jur. 666; *Bickley v. Guest*, 1 R. & M. 440; *Horner v. Swann*, 1 T. & R. 430.

<sup>2</sup> *Going v. Emery*, 16 Pick. 11; *Williamson v. Suydam*, 6 Wall. 723; *Rankin v. Rankin*, 36 Ill. 293; *Hamilton v. Buckminster*, L. R. 3 Eq. 323; *State v. Cincinnati*, 16 Ohio St. 169; *Fluke v. Fluke*, 1 Green, Ch. 478; *Macomb v. Kearney*, id. 189.

*Wood v. White*, 4 M. & Cr. 481.

<sup>4</sup> *Winston v. Jones*, 6 Ala. 550; *Craig v. Craig*, 3 Barb. Ch. 76; *Moore v. Lockett*, 2 Penn. St. 69; *Clark v. Riddle*, 11 S. & R. 311; *Scott v. Stew-*

(a) Under a deed of trust protected. *Clark v. Jones*, 93 Tenn. 639; see *Schanewerk v. Hoberecht*, 117 Mo. 22. redeem, a sale on credit with no right of redemption may be di-

of trust from which a power to convey can be inferred will authorize a sale:<sup>1</sup> as where a direction is given to sell personal estate, and invest the proceeds in land which is to remain personalty for the purposes of the trust, the trustees have a power of sale over the land purchased;<sup>2</sup> or where a will contained these words, "I sell to A.B. a parcel of land described, for six thousand dollars, if my executor is satisfied with the payment," it was held that a power of sale by the executor was implied;<sup>3</sup> but a power of sale given in a will does not apply to lands which the testator has already made a written contract to sell,<sup>4</sup> though it may apply to lands received in place of those to which the original power applied.<sup>5</sup> If a trustee is required to hold the capital for remainder-men, he has implied power to sell transient securities, as, for example, a note maturing within a year,<sup>6</sup> in order to make a permanent investment. The trustees of a local M. E. church in the United States have power under its book of discipline to mortgage or sell the church premises to pay a debt incurred in building the church.<sup>7</sup> (a) If a widow waives the provisions made for her in a will, a power of sale in the will is not thereby invalidated;<sup>8</sup> and if a trustee for sale dies before the execution of his trust, a successor may be appointed to carry the trust or sale into execution.<sup>9</sup>

§ 767. If a will directs an estate to be settled "to uses in strict settlement," a power of sale cannot be introduced into

ard, 27 Beav. 369; *Mapps v. Tyler*, 43 Barb. 421; *Rankin v. Rankin*, 36 Ill. 293.

<sup>1</sup> *South Scituate Savings Bank v. Ross*, 11 Allen, 443.

<sup>2</sup> *Tait v. Lathbury*, L. R. 1 Eq. 174; *Stockbridge v. Stockbridge*, 11 Allen, 244.

<sup>3</sup> *Jones v. Jones*, 2 Beas. 236.

<sup>4</sup> *Roome v. Phillips*, 27 N. Y. 357.

<sup>5</sup> *Price v. Huey*, 22 Ind. 18.

<sup>6</sup> *Mason v. Bank of Commerce*, 90 Mo. 452.

<sup>7</sup> *Bushong v. Taylor*, 82 Mo. 660.

<sup>8</sup> *Huyler v. Kingsland*, 3 Stockt. 406

<sup>9</sup> *Buchanan v. Hart*, 31 Tex. 647.

(a) See *More v. Calkins*, 95 Cal. 435.

the settlement, even with the consent of the tenant for life. If the will gives direction for the insertion of all proper powers and authorities for *making leases*, and doing other acts according to circumstances, a power of sale cannot be inserted.<sup>1</sup> But where marriage articles contained a provision for a settlement "with all the usual and proper powers," it was held that powers of sale and exchange were properly introduced.<sup>2</sup> In such articles, if there is no positive direction for the insertion of powers of sale, or at least no direction for the insertion of all usual and proper powers, powers of sale cannot be introduced.

§ 768. A trust with a power of sale "out and out" or to reinvest will not authorize a mortgage;<sup>3</sup> and a trust for sale, with nothing to negative the settlor's intention to convert the estate absolutely, will not authorize the trustees to execute a mortgage.<sup>4</sup> If the trustee and *cestui que trust* unite in mortgaging the property in breach of the trust, they cannot set up the breach of the trust as a defence to the mort-

<sup>1</sup> Brewster v. Angell, 1 J. & W. 625; Horn v. Barton, Jac. 437.

<sup>2</sup> Peake v. Penlington, 2 V. & B. 311; Hill v. Hill, 6 Sim. 136; Williams v. Carter, 2 Sugd. Pow. App. 23; 2 Sugd. Pow. 484.

<sup>3</sup> Stroughill v. Anstey, 1 De G., M. & G. 645; Page v. Cooper, 16 Beav. 400; Green v. Claiborne, 83 Va. 386.

<sup>4</sup> Ibid.; Haldenby v. Spofforth, 1 Beav. 390; 1 Eng. Jur. (Am. ed.) 198; Devaynes v. Robinson, 24 Beav. 86; Eland v. Baker, 29 Beav. 137; Davey v. Durant, 1 De G. & J. 535; Hubbard v. German Cath. Cong., 34 Iowa, 31; Bloomer v. Waldron, 3 Hill, 361; Waldron v. McComb, 1 Hill, 111; Wood v. Goodridge, 6 Cush. 117; Russell v. Russell, 36 N. Y. 581; Albany Ins. Co. v. Bay, 4 Comst. 9; Coutant v. Servoss, 3 Barb. 133; 4 Kent, 345; Cummings v. Williamson, 1 Sandf. Ch. 17; Williams v. Woodard, 2 Wend. 492; Tyson v. Latrobe, 42 Md. 325; Stokes v. Payne, 58 Miss. 614; Paine v. Barnes, 100 Mass. 470; Mills v. Banks, 3 P. Wms. 9; Butler v. Duncomb, 1 id. 448; Lowry v. Tiernan, 2 H. & G. 74; Dolan v. Mayor of Balt., 4 Gill, 394; Hault v. Townshend, 31 Md. 338; Stroughill v. Anstey, 1 De G., M. & G. 665; Ferry v. Laible, 31 N. J. Eq. 567. In Pennsylvania, a different rule prevails, founded upon the old case of Lancaster v. Dolan, 1 Rawle, 231, as a rule of property. See the rule discussed in the late case of Zane v. Kennedy, 73 Penn. St. 183; and see Pa. Ins. Co. v. Austen, 42 id. 24; Watson v. James, 15 La. An. 386; Goehring's App., 81 Pa. St. 284.

gage.<sup>1</sup> But where an estate is devised to trustees, charged with debts, and subject thereto upon trust for certain parties, so that a sale, though it may be authorized and required, is not the testator's sole object, the trustees may, for the purpose of paying the debts, more properly mortgage than sell.<sup>2</sup> A power to "sell and dispose" gives the power to mortgage,<sup>3</sup> but otherwise if the power is to sell in order to reinvest;<sup>4</sup> the *cestui sui juris* may, however, confirm and ratify a mortgage made by the trustee without authority.<sup>5</sup> Where the sale is for the purpose of raising a particular charge, and the estate is settled subject to that charge, it may be proper to raise the money by mortgage, and the court will support a mortgage as a *conditional* sale within the power, and as a proper mode of raising the money.<sup>6</sup> Where an estate is devised to apply the rents for a term of years, in discharging incumbrances, and if, for any reason whatever, in the opinion of the trustees a sale was necessary, "they were authorized to sell;" a purchaser cannot object that the amount of the incumbrances did not justify a sale of the whole; for the necessity depended upon the opinion of the trustees, and the conveyance is evidence that they thought it necessary.<sup>7</sup> On the other hand, a trust to raise money by mortgage will not authorize a sale, though it would be more beneficial to the estate; nor can the court substitute the one for the other.<sup>8</sup> In the absence of any direction, a power to mortgage will not authorize a mortgage with a power of sale, since a trus-

<sup>1</sup> Rider v. Sisson, 7 R. I. 311; Colesbury v. Dart, 61 Ga. 620.

<sup>2</sup> Ball v. Harris, 4 M. & Cr. 264; 8 Sim. 485; Holme v. Williams, id. 557; Lancaster v. Dolan, 1 Rawle, 231; Williams v. Woodard, 2 Wend. 492; Bootle v. Blundell, 1 Mer. 193, 212; Britton v. Lewis, 8 Rich. Eq. 271; Bogert v. Hertill, 4 Hill, 492; Duval's App., 38 Penn. St. 112; Earl of Oxford v. Albemarle, 15 Jur. 811.

<sup>3</sup> Waterman v. Baldwin, 68 Iowa, 255.

<sup>4</sup> Wilson v. Md. Life Ins. Co., 60 Md. 150.

<sup>5</sup> Ibid.

<sup>6</sup> Stroughill v. Anstey, 1 De G., M. & G. 645; Page v. Cooper, 16 Beav. 400; Leavitt v. Pell, 25 N. Y. 474.

<sup>7</sup> Rendlesham v. Meux, 14 Sim. 249.

<sup>8</sup> Drake v. Whitmore, 5 De G. & Sm. 619.

tee cannot authorize another to do what he cannot do himself.<sup>1</sup> But a power to raise money *by sale or mortgage* has been held to authorize a mortgage with a power of sale. The want of power in the trustee to delegate his authority to sell is an objection to this; for if it is assumed that the power of sale is an incident to the mortgage, it follows that a power to mortgage alone authorizes a power of sale mortgage.<sup>2</sup> In all cases where the court may order money to be raised out of an estate for the payment of debts, legacies, or portions, it may direct a sale or a mortgage with a power of sale.<sup>3</sup> But where trustees have power to sell an equity of redemption, and are directed to apply the proceeds to the discharge of the mortgage and pay the balance to the settlor, they may sell subject to the mortgage, notwithstanding the direction.<sup>4</sup>

§ 769. A power to sell does not authorize an exchange;<sup>5</sup> nor does a power to trustees to sell authorize a partition,<sup>6</sup> and whether a power to sell and exchange will do so is as yet doubtful.<sup>7</sup> (a) Where an estate was to be divided if the trus-

<sup>1</sup> *Clarke v. Royal Panopticon*, 4 Drew. 26; *Russell v. Plaice*, 18 Beav. 21; *Leigh v. Lloyd*, 2 De G., J. & S. 330. See to the contrary *In re Chawner's Will*, L. R. 8 Eq. 469.

<sup>2</sup> *Bridges v. Longman*, 24 Beav. 27. But it is said that a sale of part of the land, or a mortgage, does not exhaust the power of sale. *Asay v. Hoover*, 5 Penn. St. 21; *Piatt v. Oliver*, 2 McLean, 309.

<sup>3</sup> *Selby v. Cooling*, 23 Beav. 418; *Williamson v. Field*, 2 Sandf. Ch. 533. Query as to a lease. *Treat v. Peck*, 5 Conn. 280.

<sup>4</sup> *Manser v. Dix*, 8 De G., M. & G. 703; *Fluke v. Fluke*, 1 Green, Ch. 478.

<sup>5</sup> *Ringgold v. Ringgold*, 1 H. & Gill, 11; *Taylor v. Galloway*, 1 Hem. 232; *King v. Whiton*, 15 Wis. 684; *Cleveland v. State Bank*, 16 Ohio St. 236; *School v. McCully*, 11 Rich. 424.

<sup>6</sup> *McQueen v. Farquhar*, 11 Ves. 467. Although it is an undivided share. *Brassey v. Chalmers*, 4 De G., M. & G. 528; 16 Beav. 223; *Bradshaw v. Fane*, 3 Drew. 536; *Borel v. Rollins*, 30 Cal. 408; *Woodhull v. Longstreet*, 3 Harr. 419.

<sup>7</sup> *Abel v. Heathcote*, 4 Bro. Ch. 278; 3 Ves. Jr. 98; *Att. Gen. v. Hamilton*, 1 Madd. 214; 2 Sugd. Pow. 506.

(a) See *supra*, § 511 b, n.

tees thought fit, it was held that the trustees had no power to divide, they could only determine whether it ought to be divided.<sup>1</sup> An exchange or partition may be effected circuitously, under a power of sale only, by using the form of a sale instead of a partition or exchange; nor can the transaction be impeached as an improper execution of the power if made *bona fide*.<sup>2</sup> Trustees, with a power of sale and exchange, may pay money as owelty of exchange without any express authority for the purpose.<sup>3</sup> But a power to sell does not authorize a conveyance to a legatee in payment of a legacy,<sup>4</sup> nor to a *cestui que trust* to secure a debt.<sup>5</sup> Leases cannot be granted by trustees under mere powers of sale.<sup>6</sup> (a) And so executors, as *quasi* trustees for sale, would be justified in granting a lease only under special circumstances. Such an act is not within their duties, and it would be incumbent on the parties taking the lease to show that it was for the interest of the parties entitled to the property.<sup>7</sup> Where property is given to trustees with a power to sell, and an implied or express power of management in the mean time, they have the power to lease and to rent houses until the sale is made;<sup>8</sup> but where the land descends to the heir or is devised, and a naked power of sale is given to a trustee or executor, the heir or devisee is entitled to the profits and possession until the sale, and the trustees can neither enter

<sup>1</sup> Naglee's Estate, 52 Penn. St. 154.

<sup>2</sup> Ibid.; Marshall v. Sladden, 7 Hare, 438; Leigh v. Ashburton, 11 Beav. 478; Phelps v. Harris, 51 Miss. 789.

<sup>3</sup> Bartram v. Whichcote, 6 Sim. 86; 2 Sugd. Pow. 507.

<sup>4</sup> Russell v. Russell, 36 N. Y. 581.

<sup>5</sup> Goode v. Comfort, 39 Mo. 313.

<sup>6</sup> Evans v. Jackson, 8 Sim. 217; Mitchells v. Corbett, 34 Beav. 376; Bonney v. Ridgard, Cox, Ch. Cas. 145; Hubbard v. Elmer, 7 Wend. 446.

<sup>7</sup> Hachett v. McNamara, Ll. & Goo. t. Plunk, 283; Keating v. Keating, Ll. & Goo. t. Sugd. 133; Hedges v. Riker, 5 Johns. Ch. 163; Williams v. Woodward, 2 Wend. 487; Blake v. Sanderson, 1 Gray, 333.

<sup>8</sup> Hedges v. Riker, 5 Johns. Ch. 163; Burr v. Sim, 1 Whart. 266.

(a) See Freeman's Estate, 181 Penn. St. 405.

upon the land nor grant leases.<sup>1</sup> A power to rent or sell lands of course gives no power over lands specifically devised.<sup>2</sup>

§ 770. Trustees for sale may enter into contracts without the previous sanction of the court;<sup>3</sup> but if the administration of the trust is already before the court, the trustees cannot proceed without the sanction of the court.<sup>4</sup> (a) The trustees are bound by their office to sell the estate under every possible advantage for the beneficiaries,<sup>5</sup> and if there are different *cestuis que trust*, they must act with a fair and impartial attention to the interest of all.<sup>6</sup> In case of a trust to secure a loan and power to sell, the power is for the benefit of the lender, and the trustee is not bound to sell until he deems best for the payment of the loan, or is directed by a court of equity to do so.<sup>7</sup> If the trustees or their agents fail in reasonable diligence in inviting competition,<sup>8</sup> or in their management in relation to the sale: as, if they contract under circumstances of haste and improvidence; or if they contrive to advance the interest of one party at the expense of another, — they will be personally responsible to the in-

<sup>1</sup> *Seymour v. Bull*, 3 Day, 389.

<sup>2</sup> *Young v. Swiggs*, 27 Md. 620.

<sup>3</sup> *Bath v. Bradford*, 2 Ves. 590; *Reeside v. Peter*, 35 Md. 222; *Iles v. Martin*, 69 Ind. 114.

<sup>4</sup> *Walker v. Smallwood*, Amb. 676; *Raymond v. Webb*, Löffl. 66; *Drayson v. Pocock*, 4 Sim. 283; *Culpepper v. Aston*, 2 Ch. Cas. 116, 223; *Reeside v. Peter*, 35 Md. 222.

<sup>5</sup> *Downs v. Grazebrook*, 3 Mer. 208; *Matthie v. Edwards*, 2 Coll. 480; *Chesley v. Chesley*, 49 Mo. 540; *Gould v. Choppel*, 42 Md. 466.

<sup>6</sup> *Ord v. Noel*, 5 Madd. 140; *Anon.*, 6 id. 11; *Pechel v. Fowler*, 2 Anst. 590.

<sup>7</sup> *Walker v. Teal*, 7 Sawy. 39.

<sup>8</sup> *Ord v. Noel*, Madd. 140; *Anon.*, 6 Madd. 11; *Pechel v. Fowler*, 2 Anst. 590; *Harper v. Hayes*, 2 Gif. 216. No particular form of advertisement is required; but it should be sufficient to identify the land. *Reeside v. Peter*, 33 Md. 120; 35 Md. 221.

(a) A title to real estate cannot be conveyed by a trustee appointed by the court without its approval; after his removal by the court, of its own motion, and the appointment of a new trustee, he has no remaining interest to convey. *Kenaday v. Edwards*, 134 U. S. 117.

jured party for the loss;<sup>1</sup> and the court will refuse to decree a specific performance, though the purchaser was without fault,<sup>2</sup> or set the sale aside.<sup>3</sup> But if a contract is once fairly made, a court of equity would not invalidate it, because another person came forward and offered a larger price.<sup>4</sup> Mere inadequacy of price, unless it is so gross as to be evidence of fraud,<sup>5</sup> is not sufficient to invalidate a sale, if the transaction is in good faith, and due diligence was used in getting the best possible price for the property.<sup>6</sup> (a) If there are two offers equally advantageous, and one is preferred by the *cestui que trust*, the trustee is not bound for that reason to accept that offer, but he may act upon his own opinion.<sup>7</sup> The *cestui que trust* usually obtains the best offer he can, and communicates it to the trustee, who, when satisfied, ought to make a sale which is advantageous to the beneficiary.<sup>8</sup> The trustee should inform himself of the value of the property, if necessary, by the estimate of some experienced person;<sup>9</sup> and if he sells at a grossly inadequate price,

<sup>1</sup> Pechel v. Fowler, 2 Anst. 550; Quackenbush v. Leonard, 9 Paige, 347; Ringgold v. Ringgold, 1 H. & Gill, 11; Osgood v. Franklin, 2 Johns. Ch. 27; 14 Johns. 527; Chesley v. Chesley, 45 Mo. 540.

<sup>2</sup> Ord v. Noel, 5 Madd. 440; Turner v. Harvey, Jac. 178; Bridger v. Rice, 1 J. & W. 74; Mortlock v. Buller, 10 Ves. 292; Hill v. Buckley, 17 Ves. 394; White v. Cuddon, 8 Cl. & Fin. 766.

<sup>3</sup> Clarkson v. Creely, 35 Mo. 45; Hoppes v. Check, 21 Ark. 585.

<sup>4</sup> Harper v. Hayes, 2 De G., F. & J. 542, reversing 2 Gif. 210.

<sup>5</sup> Ante, §§ 187, 602 z; Booker v. Anderson, 35 Ill. 66; Lallance v. Fisher, 29 W. Va. 513; Dryden Ad. v. Stephens, 19 W. Va. 1.

<sup>6</sup> Abshire v. Carter, 48 Mo. 300; Bochlert v. McBride, 48 Mo. 505.

<sup>7</sup> Selby v. Bowie, 4 Gif. 300.

<sup>8</sup> Palairat v. Carew, 32 Beav. 568.

<sup>9</sup> Oliver v. Court, 8 Price, 165; Campbell v. Walker, 5 Ves. 680; Con-

(a) Mere inadequacy of price, non, 113 Mo. 508; Lurton v. Rodgers, 139 Ill. 554; Smith v. Perkins, 81 Texas, 152.

for setting aside a judicial or trustee's sale, if properly conducted otherwise. Loveland v. Clark, 11 Col. 265; Means v. Rosevear, 42 Kansas, 377; Holdsworth v. Shan-

The "highest and best bid" required by a trust deed may be that of a single bidder. Lathrop v. Tracy, 24 Col. 382.



it is a breach of trust which affects the title in the hands of the purchaser.<sup>1</sup> But as to the purchaser, no duty rests on the trustee to ferret out the state of liens and mortgages, etc., to ascertain the real value of the interest to be sold. *Caveat emptor* applies; but if he makes any statement at the sale in regard to the matter he must take care that it is accurate and not such as to mislead the bidders.<sup>2</sup> In no case will the court enforce the specific performance of a contract which amounts to a breach of trust.<sup>3</sup> A trustee who takes no active part in the sale is equally responsible, for he cannot delegate his power to a cotrustee; and where a trust is confided to several, they are all equally responsible, and cannot excuse themselves for neglecting any of their duties,<sup>4</sup> and they must all join in the deed.<sup>5</sup> A mortgagee with power of sale is a trustee, first, to control the property and apply the proceeds to the debt; second, to account for any surplus to the grantor, and he will be held to a strict account.<sup>6</sup> If it is sought to set the sale aside on the ground that it was not properly advertised, the burden is on the person seeking to invalidate the sale.<sup>7</sup>

§ 771. Trustees will be allowed a reasonable time for disposing of the estate even when directed to sell with all convenient speed; for such direction is implied by law, and does not render a sale imperative.<sup>8</sup> On the other hand, where

*nolly v. Parsons*, 3 Ves. 628; Sugd. V. & P. (8th Am. ed.) 216, §§ 43, 44, and notes.

<sup>1</sup> *Stevens v. Austen*, 7 Jur. (N. S.) 873; *Wormeley v. Wormeley*, 1 Brock. 330; 8 Wheat. 421.

<sup>2</sup> *Wicks v. Westcott*, 59 Md. 270.

<sup>3</sup> *Wood v. Richardson*, 4 Beav. 176; *Fuller v. Knight*, 6 Beav. 205; *Thompson v. Blackstone*, id. 470; *Sneesby v. Thorne*, 7 De G., M. & G. 399; *Mulholland v. Belfast*, 9 Ir. Ch. 204.

<sup>4</sup> *Berger v. Duff*, 4 Johns. Ch. 368; *Oliver v. Court*, 8 Price, 166; *In re Chertsey Market*, 6 Price, 285.

<sup>5</sup> *Ante*, §§ 412, 413.

<sup>6</sup> *Gooch v. Vaughan*, 92 N. C. 610.

<sup>7</sup> *Fulton v. Johnson*, 24 W. Va. 96; *Burke v. Adair*, 23 id. 139.

<sup>8</sup> *Buxton v. Buxton*, 1 M. & C. 80; *Garrett v. Noble*, 6 Sim. 504; *Fry*

there is no immediate emergency, it would be a breach of trust to force on the sale at a manifestly disadvantageous time.<sup>1</sup> If the power is "to sell at such times and in such manner as they shall think fit," they are not authorized, as affecting the *cestuis que trust*, to postpone the sale arbitrarily for an indefinite period.<sup>2</sup> Such postponement might vary the rights of the tenant for life and remainder-men, and so interfere with the settlor's intention. If therefore they neglect to sell without sufficient reason, they would be answerable for any depreciation, and would be decreed to account for interest instead of rents.<sup>3</sup> A trust "to sell with all convenient speed and within five years" is directory only, and the trustees can sell and make a good title after five years.<sup>4</sup> But if the time of sale is so fixed as to be of the essence of the power, as by express directions, it must be executed as given and at the time appointed,<sup>5</sup> and if trustees for sale after a particular date or event anticipate the time, they will be responsible for all loss.<sup>6</sup>

§ 772. But a power of sale or mortgage to raise portions should not be exercised until the money is wanted; as, a power to raise a specific sum for A., payable at twenty-one or at her marriage, cannot be exercised until the interest is vested; for should the money be lost or the investment prove

*v. Fry*, 27 Beav. 144; *Fitzgerald v. Jervoise*, 5 Madd. 25; *Vickers v. Scott*, 3 M. & K. 500.

<sup>1</sup> *Hunt v. Bass*, 2 Dev. Eq. 297; *Johnston v. Eason*, 3 Ired. Eq. 330; *Quarles v. Lacy*, 4 Munf. 251. If necessary, on good cause shown, the court will give the trustee leave to postpone a sale. *Morris v. Morris*, 4 Jur. (N. S.) 802-804.

<sup>2</sup> *Walker v. Shore*, 19 Ves. 391; *Hawkins v. Chappell*, 1 Atk. 623.

<sup>3</sup> *Fry v. Fry*, 27 Beav. 144; *Pattenden v. Hobson*, 1 Eq. R. 28. In *Wightwick v. Lord*, 6 H. L. Cas. 217, the trustees were made answerable for the value of the property of a mine, as they should have sold a year after the testator's death.

<sup>4</sup> *Ante*, § 490; *Pearce v. Gardner*, 10 Hare, 287; *Cuff v. Hall*, 1 Jur. (N. S.) 973; *Smith v. Kenney*, 33 Tex. 283; *Shatter's App.*, 4 Penn. St. 83.

<sup>5</sup> *Booraem v. Wells*, 4 Green, Ch. 87.

<sup>6</sup> *Isham v. Delaware, &c. R. R. Co.*, 3 Stockt. 227.

deficient, A. might call upon the estate again for her portion.<sup>1</sup> So where there was a trust of a term to raise £3,000 for children, payable at their respective ages of twenty-one or marriage, it was held that the money could not all be raised when the eldest arrived at twenty-one, as the younger children could not be deprived of the security of the estate for their portions.<sup>2</sup> But from the inconvenience of several sales or mortgages, the court will lean to such construction of the instrument, if possible, that there shall be but one exercise of the power; as, where the trustees of a marriage settlement were directed after the husband's death to raise by sale or mortgage, if there should be more than three children, the sum of £10,000 for their portions, the shares to be payable at twenty-one or marriage, and "no mortgage was to be made until some one of the portions should become payable," the Lord Chancellor said, that, on the whole instrument, the whole sum of £10,000 was to be raised at once.<sup>3</sup>

§ 773. If an estate is vested in trustees for A. for life, and then to sell, they cannot sell during the life of A., however beneficial it may be for all parties interested.<sup>4</sup> But if the devise is to A. for life, and after her decease to trustees "to sell as soon as conveniently may be after the testator's decease," the trustees, joining with A., can convey a good title.<sup>5</sup> So if a marriage settlement gives a power of sale to the trustees, and power of appointment to the *cestui que trust*, the exercise of the power of appointment does not destroy the power of sale.<sup>6</sup> If the tenant for life and the trustees of the remainder join in a sale for a gross sum, the purchaser takes a good title, and the tenant for life and the trustees may apportion the purchase-money; if they cannot agree,

<sup>1</sup> *Dickenson v. Dickenson*, 3 Bro. Ch. 19.

<sup>2</sup> *Wynter v. Bold*, 1 S. & S. 507.

<sup>3</sup> *Gillibrand v. Goold*, 5 Sim. 149.

<sup>4</sup> *Johnstone v. Baber*, 8 Beav. 233.

<sup>5</sup> *Mills v. Dugmore*, 30 Beav. 104.

<sup>6</sup> *In re Brown*, L. R. 10 Eq. 349.

the court may do it.<sup>1</sup> Generally, trustees for the sale of an aliquot part of an estate may join in a sale of the whole for an entire sum, and the purchase-money may be apportioned by the parties or the court.<sup>2</sup> But a purchaser cannot be compelled to take such a title, if the interest of the *cestui que trust* has not been sold under the most advantageous circumstances, or if the nature of the case is such that the purchase-money cannot be apportioned upon an intelligible principle.<sup>3</sup> (a)

§ 774. A trustee, like any other vendor, must make a good title to the purchaser;<sup>4</sup> therefore the most prudent course is to provide for the title before selling, either by an examination or stipulation, as the court in a suit for specific performance might order the trustee to pay costs if the title is defective.<sup>5</sup> Trustees under a power of sale have no power to split up the estate into land, timber, and mines; and therefore they cannot sell the timber separate from the land, nor the land, reserving the timber; and this although there is a tenant for life without impeachment of waste, who might cut the timber;<sup>6</sup> and there is no distinction between timber and minerals;<sup>7</sup> or they may sell several parcels in one lot where they compose a single farm.<sup>8</sup> But the trustees

<sup>1</sup> Clark v. Seymour, 7 Sim. 67.

<sup>2</sup> McCarogher v. Whieldon, 34 Beav. 107.

<sup>3</sup> Rede v. Oakes, 32 Beav. 555.

<sup>4</sup> White v. Foljambe, 11 Ves. 343; McDonald v. Hanson, 12 Ves. 277.

<sup>5</sup> Edwards v. Harvey, G. Coop. 40.

<sup>6</sup> Cholmeley v. Paxton, 3 Bing. 207; 5 Bing. 48; 10 B. & Cr. 564; 3 Russ. 565; 1 Russ. & My. 418; 1 Cl. & Fin. 60.

<sup>7</sup> Buckley v. Howell, 29 Beav. 546; Re Malins, 3 Gif. 126; Cadwalader's App., 64 Penn. St. 293.

<sup>8</sup> Kellogg v. Carrico, 47 Mo. 157.

(a) Where a power to sell was given to trustees with the consent of the tenant for life, who incumbered his life estate and became bankrupt, it was held that his power of consenting was not exhausted, but must be exercised to give a good title, for which the concurrence of his trustee in bankruptcy and of the incumbrancers was also necessary. *In re Bedingfeld and Herring's Contract*, [1893] 2 Ch. 332.

may divide the surface into lots, and sell part at one time, and part at another.<sup>1</sup>

§ 775. Though trustees may employ the tenant for life, or *cestui que trust*, as agent to effect a sale, yet they should remember that they are interposed to protect the estate from the tenant for life; if, therefore, the tenant for life, by consent of the trustees, sells the estate, receives the purchase-money, and invests it in another estate in his own name, he would be held to act throughout as the agent of the trustees, and the purchased estate would be subject to the original trusts,<sup>2</sup> and at the same time the trustees would be guilty of a breach of trust.<sup>3</sup>

§ 776. If the trust is for a tenant for life without impeachment of waste, it would be a breach of trust for the trustee to sell the land without the timber, and allow the tenants for life to take it, or the money for which it was sold; for although the tenant might have cut the timber, yet the land and the timber constitute the whole estate, and it is the duty of the trustee to sell all together and to reinvest the purchase-money upon the trusts of the settlement.<sup>4</sup> So if trustees may sell for payment of debts, and the lands subject to that charge are given over to a tenant for life without impeachment of waste, the trustees ought not to raise the money for the debts by a fall of the timber, for that is a hardship upon the tenant for life; and if they resort to the timber, the

<sup>1</sup> *Ord v. Noel*, 5 Madd. 438; *Ex parte Lewis*, 1 Gl. & J. 69; *State v. Macalester*, 9 Ohio, 19; *Gray v. Shaw*, 14 Mo. 341; *Delaplaine v. Lawrence*, 3 Comst. 301; *Ewing v. Higby*, 7 Ohio, 98; *Thomas v. Townsend*, 16 Jur. 736; *Bloemer v. Waldron*, 3 Hill, 372; *Gillespie v. Smith*, 29 Ill. 472; *Miller v. Evans*, 35 Mo. 45; *Carter v. Abshire*, 48 Mo. 300; *Sumrall v. Chaffin*, id. 402.

<sup>2</sup> *Price v. Blakemore*, 6 Beav. 507.

<sup>3</sup> *Mortlock v. Buller*, 10 Ves. 313.

<sup>4</sup> *Cholmeley v. Paxton*, 3 Bing. 207; 5 Bing. 48; 3 Russ. 565; 2 Mocre & P. 127; 10 B. & Cr. 564; *Cockerell v. Cholmeley*, 1 Russ. & M. 418; 1 Cl. & Fin. 60; *Waldo v. Waldo*, 12 Sim. 107; *Doran v. Wiltshire*, 3 Swanst. 699; *Wolf v. Hill*, 1 Swanst. 149, n.

tenant would in equity have a charge upon the lands for the proceeds.<sup>1</sup> Nor should a sum, to be invested in lands for a tenant for life without impeachment of waste, with remainders over, be invested by the trustees in the purchase of wood or timber lands; for the tenant might fell the timber and get possession of the greater part of the estate; but the trustees would be justified in purchasing an ordinary wooded estate, as it is not to be supposed that it was intended they should purchase lands with no trees upon it.<sup>2</sup>

§ 777. Where trustees had a power of sale, to be exercised with the consent of the tenant for life, with a direction to invest the proceeds in another purchase with all convenient speed, and in the mean time to invest them upon some proper security, Lord Eldon said: "The object of the sale must be to invest the money in the purchase of another estate to be settled to the same uses, and the trustees are not to be satisfied with probability upon that, but it ought to be with reference to an object at that time supposed practicable, or, at least, this court would expect some strong purpose of family convenience, justifying the conversion, if it is likely to continue money."<sup>3</sup> So the trustees would not be justified in selling, as between themselves and the *cestuis que trust*, to gratify caprice, or to promote the exclusive interest of the tenant for life. Particular circumstances might happen which would call for an immediate sale, as an extremely advantageous offer, or a prospect of great depreciation or deterioration; but generally the trustees ought not to convert the estate into money without having another specific purchase in view, and then not for the purpose of conversion, but in the honest exercise of their discretion for the benefit of all parties claiming under the settlement.<sup>4</sup> The power of

<sup>1</sup> *Davies v. Wescomb*, 2 Sim. 425.

<sup>2</sup> *Burgess v. Lamb*, 16 Ves. 174.

<sup>3</sup> *Mortlock v. Buller*, 10 Ves. 308; *Mahon v. Stanhope*, cited 2 Sugd. Pow. 512.

<sup>4</sup> *Cowgill v. Oxmantown*, 3 Y. & Col. 369; *Watts v. Girdlestone*, 6 Beav. 188; *Marshall v. Sladden*, 4 De G. & Sm. 468; *Wormeley v. Wormeley*, 1 Brock. 330; 8 Wheat. 421.

investing the proceeds in some security, in the mean time, was not intended to authorize the continuance of the property in money, but only to meet some contingency, as where the trustees were disappointed in a contemplated purchase, or there was some necessary delay in completing the title to it. The sale will be void, if the trustees appear to have been influenced by private or selfish purposes.<sup>1</sup>

§ 778. Where trustees have a power of sale at the written request and direction of another party, they cannot obtain a decree for specific performance of a sale contracted by them without showing such writing; nor will proof of a part performance of the contract by the parties, so as to take the sale out of the statute of frauds, be sufficient.<sup>2</sup>

§ 779. A trustee cannot delegate the trust or power of sale to a third person,<sup>3</sup> unless the trust-deed permits delegation,<sup>4</sup> especially if it is a naked power, coupled with no interest.<sup>5</sup> A sale executed by such delegated agent is void.<sup>6</sup> Nor can one trustee delegate his power to a cotrustee.<sup>7</sup> But such trustees for sale may employ a solicitor or agent, according to the usage of business, if they use proper prudence;<sup>8</sup> the agent's authority should be in writing, in order to make a binding contract,<sup>9</sup> or it should be ratified in writing,<sup>10</sup> and all

<sup>1</sup> Ibid.

<sup>2</sup> *Adams v. Broke*, 1 Y. & Col. Ch. 627; *Sykes v. Sheard*, 33 Beav. 114; *Blackwood v. Burrowes*, 2 Con. & Law. 459; *Phillips v. Edwards*, 33 Beav. 440.

<sup>3</sup> *Hardwick v. Mynd*, 1 Anst. 109; *Newton v. Bronson*, 3 Kern. 587; *Hawley v. James*, 5 Paige, 487; *St. Louis v. Priest*, 88 Mo. 612; *Fuller v. O'Neil*, 69 Tex. 349.

<sup>4</sup> *Hess v. Dean*, 66 Tex. 666.

<sup>5</sup> *Black v. Erwin*, Harp. L. 411.

<sup>6</sup> *Pearson v. Jamison*, 1 McLean, 197.

<sup>7</sup> *Berger v. Duff*, 4 Johns. Ch. 368.

<sup>8</sup> *Ex parte Belchier*, Amb. 218; *Ord v. Noel*, 5 Madd. 498; *Rossiter v. Trafalgar Life Ass. Co.*, 27 Beav. 377; *Sinclair v. Jackson*, 8 Cow. 582; *Hawley v. James*, 5 Paige, 487; *Gillespie v. Smith*, 29 Ill. 473.

<sup>9</sup> *Mortlock v. Buller*, 10 Ves. 311.

<sup>10</sup> *Newton v. Bronson*, 3 Kern. 587.

the trustees should join in the appointment or ratification.<sup>1</sup> The proper proceeding is for the trustees to keep the business in their own hands; to employ agents, if necessary, to negotiate the details of the sale, subject to the approval of the trustees; and the deeds should be executed by them, and not by attorney.<sup>2</sup> (a) If the donee of the power is a married woman, her husband need not join in the deed.<sup>3</sup> If, however, the *fee* is in the trustees, so that they have an estate coupled with a power, they may act by attorney duly appointed in writing.<sup>4</sup> And it has been said that trustees for creditors may convey by attorney.<sup>5</sup> A public officer cannot, however, be appointed to convey in the absence, or upon the death of the trustee.<sup>6</sup>

§ 780. In the absence of express directions in the power, trustees may sell at public auction or private sale, as circumstances may render it most for the advantage of the trust estate.<sup>7</sup> In Massachusetts the court may license the trustee

<sup>1</sup> Mortlock v. Buller, 10 Ves. 311; Sinclair v. Jackson, 8 Cow. 582.

<sup>2</sup> Hawley v. James, 5 Paige, 487; Cranston v. Crane, 97 Mass. 459; Gillespie v. Smith, 29 Ill. 473.

<sup>3</sup> Cranston v. Crane, 97 Mass. 459.

<sup>4</sup> May's Heirs v. Frazer, 4 Lit. 391; Telford v. Barney, 1 Iowa, 591.

<sup>5</sup> Blight v. Schenck, 10 Penn. St. 285. The power of trustees, executors, and others, acting in a fiduciary capacity, to contract and execute their powers by attorney, is regulated by statute in some of the States. The reader will examine the statutes of his own State. Johns v. Sergeant, 45 Miss. 332.

<sup>6</sup> Miller v. Evans, 35 Mo. 45.

<sup>7</sup> *Ex parte* Dunman, 2 Rose, 66; *Ex parte* Hurley, 1 D. & Ch. 631; *Ex parte* Ladbroke, 1 Mont. & A. 384; *Ex parte* Goding, 1 D. & Ch. 323; Davey v. Durant, 1 De G. & J. 535; Huger v. Huger, 9 Rich. Eq. 217; Harper v. Hayes, 2 Gif. 210; 2 De G. & J. 542; Noble v. Edwardes, L. R. Ch. D. 378; Jackson v. Williams, 50 Ga. 553. In Pennsylvania, a pri-

(a) The trustee is presumed to have done those acts which were conditions precedent to a valid exercise of the power of sale; and mere ministerial acts of posting the notices and making the sale may be performed by agents selected by the trustee. Johns v. Sergeant, 45 Miss. 332; Graham v. Fitts, 53 id. 307; Tyler v. Herring, 67 Miss. 169; 19 Am. St. Rep. 263, and note.



to sell either at public or private sale, as seems expedient.<sup>1</sup> Even when assignees for creditors were required to sell at public auction, it was held that, after an ineffectual attempt to sell at auction, they might sell by private contract.<sup>2</sup> If the power directs a sale at public auction, it must be followed;<sup>3</sup> but where trustees, directed to sell at auction, were not able to effect a sale after unusual efforts, it was held that a private sale, made in good faith, though for less than a public offer, was valid.<sup>4</sup> And it has been held, that a power to sell at auction or otherwise, in whole or in parcels, on giving three weeks' notice, authorized a private sale, without any notice.<sup>5</sup> Under a power to sell at auction, and where there is an advertisement and an auction, the highest bid, sent by letter and accepted, is valid.<sup>6</sup> And the trustees may waive a bid and a sale, and resell the property at another time, upon a new notice.<sup>7</sup> If a bid is made under a misapprehension, it may be waived, and the land sold at a lower bid.<sup>8</sup> So if the acceptance of a bid would prejudice or defeat the purpose of the sale, it should be refused.<sup>9</sup>

§ 781. A sale at auction is always the safest, as it is the usual, form of sale; for a sale at a regularly advertised and

vate sale, under a power, was held void. *McCreery v. Hamlin*, 7 Penn. St. 87; *Ellet v. Paxson*, 2 W. & S. 418. But it is now altered by statute. See *Ashhurst v. Ashhurst*, 13 Ala. 781; *Burr v. McEwen*, Bald. C. C. 154; *Mattox v. Eberhart*, 38 Ga. 581; *Crane v. Reeder*, 22 Mich. 339.

<sup>1</sup> *Boston Safe Deposit & Trust Co. v. Mixter*, 146 Mass. 100, 105.

<sup>2</sup> *Mathers v. Prestman*, 9 Sim. 352.

<sup>3</sup> *Greenleaf v. Queen*, 1 Pet. 145.

<sup>4</sup> *Tyson v. Mickle*, 2 Gill, 383; *Gibbs v. Cunningham*, 1 Md. Ch. 44; *Gibson's Case*, 1 Bland, 138; *Beebe v. De Baun*, 3 Eng. (Ark.) 567. And the court may grant leave to sell at the reserved price fixed at the auction, and allow one of the trustees to become purchaser. *Farmer v. Dean*, 32 Beav. 327; *Bousfield v. Hodges*, 33 id. 90.

<sup>5</sup> *Minuse v. Cox*, 5 Johns. Ch. 441.

<sup>6</sup> *Tyree v. Williams*, 3 Bibb, 367.

<sup>7</sup> *Dover v. Kennedy*, 38 Mo. 469. But he ought not to sell on the same day. He should appoint another day, and give new notices. *Judge v. Booze*, 47 Mo. 544. See *Barnard v. Duncan*, 38 Mo. 170.

<sup>8</sup> *Waterman v. Spaulding*, 51 Ill. 425.

<sup>9</sup> *Gray v. Viers*, 33 Md. 18.

properly conducted auction cannot be questioned, and no question can be raised as to the adequacy of the price,<sup>1</sup> especially if the property is in the hands of a *bona fide* purchaser.<sup>2</sup> But in case of a private sale, if the price procured is less than the estimated value, the trustee incurs great responsibility and some danger.<sup>3</sup> Courts scrutinize such sales with great jealousy, and if there is any fraud, oppression, unfairness, or irregularity, or even a suspicion of them, the sale will be set aside.<sup>4</sup>

§ 782. If the trustees sell at auction, they must see that proper advertisements are made and due notice given to all parties;<sup>5</sup> and the court will enjoin the sale, if there is any want of diligence in this respect.<sup>6</sup> No particular form of notice or advertisement is required; it must state the time and place of the sale correctly,<sup>7</sup> and be sufficient to identify the land, and to invite competition.<sup>8</sup> If by the power or license of sale a notice is to be given at a particular place, a sale upon notice given at another place will be void.<sup>9</sup> If the manner of the sale is in express terms left to the discretion of the trustee, no advertisement is necessary:<sup>10</sup> but if the power or a statute requires a certain number of days' notice before the sale, the advertisement must be made every day;<sup>11</sup>

<sup>1</sup> *Waterman v. Spaulding*, 51 Ill. 425.

<sup>2</sup> *Shine v. Hill*, 23 Iowa, 264.

<sup>3</sup> *Ord v. Noel*, 5 Madd. 440; *Taylor v. Tabrum*, 6 Sim. 281; *Connolly v. Parsons*, 3 Ves. 628, n.; *Mortlock v. Buller*, 10 Ves. 292, 309; *Johnson v. Dorsey*, 7 Gill, 269; *Hintze v. Stingel*, 1 Md. Ch. Dec. 283.

<sup>4</sup> *Penny v. Cook*, 19 Iowa, 538.

<sup>5</sup> *Anon.*, 6 Madd. 10; *Blennerhassett v. Day*, 2 B. & B. 133. See *Boston Safe Deposit & Trust Co. v. Mixer*, 146 Mass. 100, 105, as to what is sufficient notice under the Mass. Stats.

<sup>6</sup> *Ibid.*; *Ante*, §§ 602 q-602 u; *Matthie v. Edwards*, 2 Col. C. C. 465; 11 Jur. 504; *Jenkins v. Jones*, 2 Gif. 99; *Pechel v. Fowler*, 2 Anst. 549, has not been followed.

<sup>7</sup> *Stephenson v. January*, 49 Mo. 465.

<sup>8</sup> *Newman v. Jackson*, 12 Wheat. 570; *Reeside v. Peter*, 33 Md. 120.

<sup>9</sup> *Sears v. Livermore*, 17 Iowa, 297.

<sup>10</sup> *McDermot v. Lorillard*, 1 Edw. Ch. 273.

<sup>11</sup> *Stine v. Wilkson*, 10 Mo. 75. A publication in a weekly newspaper

and if a certain number of weeks are required, the advertisement must be made that number of weeks successively. The trustees may adjourn a duly advertised sale from time to time, and the notice of the adjournments need not be as formal as the first notices appointing the time of sale.<sup>1</sup> If notice is required by the power, those persons relying upon the validity of the sale must show that the power was complied with;<sup>2</sup> but a clerical mistake in the statement of the notice in the deed will not vitiate the sale, if the proper notice was in fact given.<sup>3</sup> Chancellor Kent was of opinion that want of notice would not affect the title, but that the trustee would be personally responsible; and so it is said that a purchaser cannot raise this objection to avoid fulfilling his contract.<sup>4</sup> Whatever may be the rule as to notice of sales under a power in wills, it is certain that trustees, executors, and guardians, who sell under statute powers, and under decrees and licenses of the courts in which they are administering estates, must strictly comply with all the statutes as to notice, oath, and bonds, or their acts will be void; and a purchaser is not compelled to complete the contract, if there is any irregularity in the proceedings. A stranger or wrong-doer cannot object to any irregularity in the proceedings of the sale;<sup>5</sup> nor can such sale be attacked collaterally;<sup>6</sup> nor can a purchaser or other person make any objection to the completion of the contract, where the *cestuis que trust*, being competent to act for them-

operates as a constructive daily notice until the next issue. *Campbell v. Tagge*, 30 Iowa, 305; *Sears v. Livermore*, 17 Iowa, 300; *Lefler v. Armstrong*, 4 Iowa, 482.

<sup>1</sup> *Richards v. Holmes*, 18 How. 143; *Burnet v. Brundage*, 8 Minn. 432. Otherwise in Illinois. *Thornton v. Boyden*, 31 Ill. 200; *Griffin v. Marine Co.*, 52 Ill. 130.

<sup>2</sup> *Gibson v. Jones*, 5 Leigh, 370; *Hahn v. Pindell*, 1 Bush. 358.

<sup>3</sup> *O'Neil v. Vanderburg*, 25 Iowa, 104.

<sup>4</sup> *Minuse v. Cox*, 5 Johns. Ch. 447; *Greenleaf v. Queen*, 1 Pet. 145; *Beebe v. De Baun*, 3 Eng. 567; *Johnson v. Dorsey*, 7 Gill, 269; *Gibbs v. Cunningham*, 1 Md. Ch. Dec. 44; *Cassell v. Ross*, 33 Ill. 244.

<sup>5</sup> *Hilleglass v. Hilleglass*, 5 Barr, 97; *Gary v. Colgin*, 11 Ala. 514; *Wightman v. Doe*, 24 Miss. 675; *Herbert v. Hanrick*, 16 Ala. 518; *Larco v. Casanueva*, 30 Cal. 560.

<sup>6</sup> *Reed v. Mullins*, 48 Mo. 344; *Williams v. Munroe*, 67 N. C. 164.

selves, waive all irregularities.<sup>1</sup> In the first instance, there is always a general presumption in favor of meritorious parties, as purchasers for value, that the power has been properly exercised.<sup>2</sup>

§ 783. A power of sale, like all other powers, can be exercised only in the mode, and upon the exact conditions, terms, and occasions prescribed in the instrument of trust;<sup>3</sup> as, where the power is to sell for a certain price, the trustee cannot sell for less;<sup>4</sup> and where the direction is to sell for cash, a sale upon credit is bad.<sup>5</sup> Whether a trustee can sell on credit or not where no directions are given, is perhaps an open question;<sup>6</sup> where a trust is to sell after the death of the tenant for life,<sup>7</sup> or when the *cestui que trust* arrives at his majority,<sup>8</sup> a sale before the time is bad, although made by decree of court,<sup>9</sup> or act of the legislature.<sup>10</sup> But the execution of the power of sale may be accelerated by the tenant for life surrendering the life-estate to the remainder-man, if capable of acting;<sup>11</sup> or by joining with the trustees in effecting the conveyance; for, the postponement of the sale being

<sup>1</sup> *Greenleaf v. Queen*, 1 Pet. 145; *Schenck v. Ellenwood*, 3 Edw. Ch. 175.

<sup>2</sup> *Marshall v. Stephens*, 8 Humph. 159.

<sup>3</sup> *Wright v. Wakeford*, 17 Ves. 459; *Rodman v. Munson*, 13 Barb. 63; *Sweigart v. Berk*, 8 S. & R. 304; *In re Vandervoot*, 1 Redfield, N. Y. Sur. 270; *Alley v. Lawrence*, 12 Gray, 373; *Hunt v. Townshend*, 31 Md. 336; *Booraem v. Wells*, 4 Green, Ch. 87; *Bakewell v. Ogden*, 2 Bush, 265; *Mills v. Taylor*, 30 Tex. 7; *Young v. Benthuyssen*, id. 762; *Palmer v. Williams*, 24 Mich. 328; *Berrien v. Thomas*, 65 Ga. 61.

<sup>4</sup> *Caldwell v. Brown*, 36 Ill. 103.

<sup>5</sup> *Waterman v. Spaulding*, 51 Ill. 425; *Cassell v. Ross*, 33 Ill. 244; *Palmer v. Williams*, 24 Mich. 328.

<sup>6</sup> *Carnes v. Polk*, 4 Coldw. 87; *Drusadow v. Wilde*, 63 Penn. St. 170.

<sup>7</sup> *Blacklow v. Laws*, 2 Hare, 40; *Styer v. Freas*, 15 Penn. St. 339; *Davis v. Howcote*, 1 Dev. & Bat. Ch. 460; *Jackson v. Lignon*, 3 Leigh, 161.

<sup>8</sup> *Loomis v. McClintock*, 10 Watts, 274.

<sup>9</sup> *Blacklow v. Laws*, 2 Hare, 40.

<sup>10</sup> *Ervin's App.*, 16 Penn. St. 256.

<sup>11</sup> *Truell v. Tysson*, 21 Beav. 439. But if a widow is made tenant for life, and waives the provisions of the will and claims dower, the sale cannot be accelerated. *Jackson v. Lignon*, 3 Leigh, 161.

for the benefit of the tenant for life, such tenant may, by executing the deed of conveyance, waive such benefit.<sup>1</sup> If, however, the postponement of the sale is not for the benefit of the tenant for life, but for the benefit of the remaindermen, as by preserving real security for them, or with the expectation of securing a rise in value for them, the sale of the estate cannot be accelerated, even with the concurrence of the tenant for life.<sup>2</sup> Where the direction was to sell as soon as convenient, and within five years, it was held to be monitory, and a sale after five years was held good.<sup>3</sup> Where trustees were authorized to postpone sales, but not beyond ten years, it was held, that on proof that a sale within that time would have been mischievous to the estate, the trustees might be ordered after that time to sell.<sup>4</sup> A power to sell, if the income of the real and personal estate is not sufficient to support the testator's wife comfortably, can only be exercised in that event.<sup>5</sup> A power to sell, after redeeming from a sale for taxes, cannot be exercised before such redemption;<sup>6</sup> and a power to sell, to discharge the instalment of a debt then due, cannot be exercised by selling to pay that instalment, and also another not due.<sup>7</sup> Where the power is to sell before a certain period expires, a sale within the period is good, though the deed is dated afterwards, and the actual time of the contract of sale may be shown by parol.<sup>8</sup> (a)

<sup>1</sup> *Styer v. Freas*, 15 Penn. St. 339; *Gast v. Porter*, 13 id. 533; *Davis v. Howcote*, 1 Dev. & Bat. Ch. 460, is the other way.

<sup>2</sup> *Gast v. Porter*, 13 Penn. St. 535; *Pearce v. Gardner*, 10 Hare, 290; *Cuff v. Hall*, 19 Jur. 973.

<sup>3</sup> *Pearce v. Gardner*, 10 Hare, 287; *Smith v. Kinney*, 33 Tex. 283.

<sup>4</sup> *Cuff v. Hall*, 1 Jur. (N. S.) 973.

<sup>5</sup> *Minot v. Prescott*, 14 Mass. 495.

<sup>6</sup> *Devinney v. Reynolds*, 1 W. & S. 332.

<sup>7</sup> *Ormsby v. Tarascon*, 3 Litt. 411.

<sup>8</sup> *Harlan v. Brown*, 2 Gill, 475.

(a) Where a power was given to postpone the sale of a residue devised on trust to sell, and also to sell a particular business speedily, the trustee was not enabled to carry on the business indefinitely, but the court authorized him to carry it on for two years. *In re Smith*, [1896] 1 Ch. 171.

Where the trustee may exercise his own discretion as to the time and manner of sale, his discretion cannot generally be questioned, except in the absence of good faith.<sup>1</sup> But even a discretionary power cannot be exercised after all the purposes of the power and of the trust have been satisfied; as where all the persons for whom the trust was created are dead, and the property *in specie* goes to the remainder-men.<sup>2</sup> But if any of the trusts remain to be executed, the trustees may exercise the power of sale.<sup>3</sup> So a power to executors to sell *virtute officii* ceases when all the purposes of the power are accomplished; as when the estate is fully administered, or the debts are all paid, or barred by lapse of time, or the purpose of the power has become impossible of accomplishment.<sup>4</sup> If a trustee sells after the debt is paid for the payment of which the power of sale was given to him, or after payment is tendered, the purchaser will take no title;<sup>5</sup> but if the sale is simply for more than there is due on the debt, the purchaser will take a good title.<sup>6</sup> The court may enjoin a sale when the purposes of the trust are satisfied.<sup>7</sup>

§ 784. If the sale is directed to be made with the consent of the tenant for life, or any other person, such consent is indispensable to a valid exercise of the power.<sup>8</sup> Where the sale is to be made with the consent of the tenant for life, his consent to a decree of sale is sufficient;<sup>9</sup> and if the tenant for life sells and conveys his life-estate to a third person, he

<sup>1</sup> Bunner v. Storm, 1 Sand. Ch. 357; Champlin v. Champlin, 3 Edw. Ch. 571; 7 Hill, 245; Greer v. McBeth, 12 Rich. Eq. 254.

<sup>2</sup> Slocum v. Slocum, 4 Edw. Ch. 613.

<sup>3</sup> Cresson v. Ferree, 70 Penn. St. 446.

<sup>4</sup> Jackson v. Jansen, 6 Johns. 73; Sharpsteen v. Tillon, 3 Cow. 651; Ward v. Barrows, 22 Ohio, 241; Stroughill v. Anstey, 1 De G., M. & G. 635.

<sup>5</sup> Welch v. Greenalge, 2 Heisk. 210.

<sup>6</sup> Waterman v. Spaulding, 51 Ill. 432.

<sup>7</sup> Neely v. Steele, 1 Barb. Eq. 240; Murdock v. Johnson, 7 Coldw. 605.

<sup>8</sup> Mortlock v. Buller, 10 Ves. 308; Bateman v. Davis, 3 Madd. 98; Wright v. Wakeford, 17 Ves. 459; Rickett's Trusts, 1 John. & H. 70.

<sup>9</sup> Tyson v. Mickle, 3 Gill, 376.

must consent to a sale by the trustees.<sup>1</sup> If the tenant for life becomes bankrupt or insolvent, his power to consent or dissent is not taken away; but his assignees must join with him in assenting to the sale.<sup>2</sup> Where the trust for sale is upon condition that the grantor or donor shall consent in writing to the sale, no sale can be made without such consent, and the death of the grantor will destroy the power.<sup>3</sup> Where there was a trust for sale, but no sale was to be made without the consent "of my sons and daughters," and a daughter had died, leaving a husband absolutely entitled to her share, and all the surviving children and the husband consented to the sale, it was held to be too doubtful a title to force upon a purchaser.<sup>4</sup> But where there was a power to sell with the consent of a majority of the testator's children, the consent of the majority of children *living* at the time of the sale was held sufficient, although one had died;<sup>5</sup> and the same doctrine was held where all had died.<sup>6</sup> Where a testator gave his "executor" power to sell with the consent of his wife, and then appointed his wife executrix, it was held that she could sell without any concurrence from anybody.<sup>7</sup> If the power to sell depends upon the consent of any person or persons, their death, or the death of one of them, generally defeats the power.<sup>8</sup> But where the power depends upon the

<sup>1</sup> *Warburton v. Farn*, 16 Sim. 625; *Vincent v. Ennys*, 3 Vin. Ab. 433; *Ren v. Bulkeley*, Doug. 292; *Long v. Rankin*, 2 Sugd. Pow. 539; *Tyrrell v. Marsh*, 3 Bing. 31; *Davies v. Bush*, McClel. & Y. 58. But see *Alexander v. Mills*, 39 L. J. Ch. 407; 18 W. R. 635; 22 L. T. (N. S.) 396.

<sup>2</sup> *Holdsworth v. Goose*, 29 Beav. 111; *Eisdell v. Hammersley*, 31 Beav. 255; *Jones v. Winwood*, 10 Sim. 150; 3 M. & W. 653, overruling *Badham v. Mee*, 1 My. & K. 32; 1 Sugd. Pow. 80; *Alexander v. Mills*, 39 L. J. Ch. 407; 18 W. R. 635; 22 L. T. (N. S.) 396.

<sup>3</sup> *Kissam v. Dierkes*, 49 N. Y. 602.

<sup>4</sup> *Sykes v. Sheard*, 2 De G., J. & Sm. 6; Co. Litt. 113 a; *Dame v. Annas*, Dyer, 219; *Atwaters v. Burt*, 2 Cro. Eliz. 856; *Mansell v. Mansell*, Wilm. 36; *Green v. Green*, 2 Jo. & Lat. 529; Sugd. Pow. 126, 128, 152.

<sup>5</sup> *Sohier v. Williams*, 1 Curtis, 479.

<sup>6</sup> *Leeds v. Wakefield*, 10 Gray, 514.

<sup>7</sup> *Williams v. Williams*, 1 Duv. Ky. 221; *Griswold v. Perry*, 7 Lansing, 98.

<sup>8</sup> *Sykes v. Sheard*, 2 De G., J. & Sm. 6; *Alley v. Lawrence*, 12 Gray, 373.

consent of persons filling a particular office or bearing a particular character, the consent of such persons will be sufficient, though they may have been appointed in the place of those who had died or resigned.<sup>1</sup> The persons whose consent is necessary will not be allowed to withhold it for improper and selfish purposes.<sup>2</sup> Where the required consent must be in writing, any writing signed by the party implying his consent will be sufficient, whether it is a deed, mortgage, or other paper, by which his consent is given or implied.<sup>3</sup>

§ 785. Upon the same principles, where the power is to be exercised only upon some condition or contingent event, such as the deficiency of another estate to pay certain charges,<sup>4</sup> or to pay debts, or upon the purchase and settlement of another estate to the same uses,<sup>5</sup> the power cannot be executed except upon the performance of the conditions.<sup>6</sup> If it is a power to sell to pay debts upon a "deficiency of personal assets," there must be a deficiency to justify the exercise of the power.<sup>7</sup> Such conditions are precedent to the right to exercise the power, and may be traversed; therefore the right to exercise the power must be shown.<sup>8</sup> If the executors have power to sell, if "*in their opinion* a sale is necessary to pay debts and legacies," the sale is conclusive proof of their opinion that it was necessary, if they act in

<sup>1</sup> Barber v. Cary, 1 Kern. 397.

<sup>2</sup> Norcum v. D'Oench, 2 Ben. (Mo.) 98.

<sup>3</sup> Montefiore v. Browne, 7 Il. L. Cas. 241.

<sup>4</sup> Dike v. Ricks, Cro. Car. 335; Culpepper v. Ashton, 2 Ch. Ca. 221; 2 Sugd. Pow. 497; 2 Sugd. V. & B. 48.

<sup>5</sup> Doe v. Martin, 4 T. & R. 39; Cox v. Chamberlain, 4 Ves. 631; Burgoigne v. Fox, 1 Atk. 575; Hougham v. Sandys, 2 Sim. 95, 145.

<sup>6</sup> 2 Sugd. Pow. 497.

<sup>7</sup> Roseboom v. Mosher, 2 Denio, 61, per Bronson, Ch. J.; Graham v. Little, 5 Ired. Eq. 407; Bloodgood v. Bruen, 2 Brad. Sur. 8.

<sup>8</sup> Ibid.; Minit v. Prescott, 14 Mass. 495; Griswold v. Perry, 7 Lansing, 103. After sale and deed passed, the presumption is, that trustee did those things *in pais* which were conditions precedent, and the burden is on those who question the validity of the sale. Graham v. Fittz, 55 Miss. 307; Wilson v. South Park Com'rs, 70 Ill. 46.



good faith.<sup>1</sup> So, if the personal estate is insufficient, the executors with such powers *must* sell, whether they deem it expedient or not.<sup>2</sup> If the debts are all paid or barred, the trustee will no longer be justified in exercising the power of sale.<sup>3</sup> Where a sale, under such a power, is made after a great length of time, and the heirs and devisees are in the occupation of the land, a purchaser will be held to inquire into the necessity of the sale, and to see to the application of the purchase-money.<sup>4</sup> There is a material difference between conditions precedent and subsequent annexed to powers. If it is a condition precedent, no sale can be sustained under the power unless the condition is performed. Thus in the case of a deed with power of sale for the payment of any balance that might be due, the trustees to make oath before a justice of the peace, or, in case of the death of one, the survivor to make oath as to the amount due, the provision was held to be a condition precedent, to be strictly complied with, and the oath of one, the other being alive, was held to be insufficient to justify a sale.<sup>5</sup> So if the deficiency of the personal estate or any other property is the condition upon which the power of sale is to be exercised, it is a *condition precedent* upon which the power is to arise; and the purchaser must ascertain the right to exercise it.<sup>6</sup> But where

<sup>1</sup> *Roseboom v. Mosher*, 2 Denio, 61; *Rendlesham v. Meux*, 14 Sim. 249. See *Penniman v. Sanderson*, 13 Allen, 193. It is said in *Silverthorn v. McKinster*, 2 Pa. St. 67, and *Coleman v. McKinney*, 3 J. J. Marsh. 251, that a deficiency of the personal estate need not be shown, and that the conveyance under the power raises the presumption that it existed. The cases hardly seem consistent with principle. But see *Hamilton v. Crosby*, 32 Conn. 342.

<sup>2</sup> *Coleman v. McKinney*, 3 J. J. Marsh. 246.

<sup>3</sup> *Jackson v. Jansen*, 6 Johns. 73; *Sharpsteen v. Tillon*, 3 Cow. 651; *Ward v. Barrows*, 22 Ohio, 241; *Stroughill v. Anstey*, 1 De G., M. & G. 635; *Penny v. Cook*, 19 Iowa, 538.

<sup>4</sup> *Stroughill v. Anstey*, 1 De G., M. & G. 635. This would seem to be the reasonable rule; but in *Sabin v. Heape*, 27 Beav. 553, a sale after twenty-seven years was held not to impose such precautions upon the purchaser.

<sup>5</sup> *Mason v. Martin*, 4 Md. 125.

<sup>6</sup> 2 Sugd. V. & P. 48; *Hill on Trustees*, 178.

the condition is *subsequent*, the power of sale will attach independently of the performance of the condition. As, where the purchase-money is to be reinvested, it being a condition subsequent, a *bona fide* purchaser will not be affected by its non-performance, if the trustees had power to give receipts for the money.<sup>1</sup>

§ 786. Trustees may propose any reasonable conditions of sale;<sup>2</sup> but they must not dampen the sale by clogging it with unnecessary conditions and restrictions.<sup>3</sup> If they do any act, or make any declarations, or impose any conditions, which prevent competition and cause a sacrifice of the property, the sale will be set aside.<sup>4</sup> But a sale is not void merely for inadequacy of price (even though the property is sold for less than one half its value), unless so gross as to raise the presumption of fraud.<sup>5</sup> They may do all reasonable acts which are necessary for clearing and perfecting the title and completing the sale.<sup>6</sup> The word *grant* was formerly supposed to imply a covenant, for that reason it was left out of trustees' deeds, and they merely *bargained* and *sold*; but it was an unnecessary caution.<sup>7</sup> Still they are not justified in covenanting against anything but their own acts;<sup>8</sup> but if they have any beneficial interest in the trust estate they may

<sup>1</sup> Roper v. Halifax, Sugd. Pow. App. No. 3; Hill on Trustees, 178.

<sup>2</sup> Hobson v. Bell, 2 Beav. 17.

<sup>3</sup> Downs v. Grazebrook, 3 Mer. 208; Wilkins v. Frye, 2 Rose, 375; 1 Mer. 268; Rede v. Oakes, 10 Jur. (N. S.) 1246; Falkner v. Equitable Soc., 4 Drew. 352.

<sup>4</sup> Goodwin v. Mix, 38 Ill. 115; Barnard v. Duncan, 38 Mo. 170. And the court will in such case interfere by injunction to prevent a sale likely to be a disadvantageous one. Dance v. Goldingham, L. R. 8 Ch. 902.

<sup>5</sup> Lallance v. Fisher, 29 W. Va. 513.

<sup>6</sup> Forshaw v. Higginson, 8 De G., M. & G. 827.

<sup>7</sup> Co. Litt. 384 a, note 1.

<sup>8</sup> White v. Foljambe, 11 Ves. 345; Onslow v. Londesborough, 10 Hare, 74; Worley v. Frampton, 5 Hare, 560; Stephens v. Hotham, 1 K. & J. 571; Page v. Broom, 3 Beav. 36; Copper Mining Co. v. Beach, 13 Beav. 478; Hodges v. Blagrove, 18 Beav. 405; Phillips v. Everard, 5 Sim. 102; Sugd. V. & P. 61; Barnard v. Duncan, 38 Mo. 170.

enter into full covenants.<sup>1</sup> If the purchaser abandons the bargain, and forfeits his deposit, the trustees must account for the forfeit money to the *cestui que trust*;<sup>2</sup> and they are accountable for any unnecessary delay in recovering the deposit money from the auctioneer.<sup>3</sup>

§ 786 a. So trustees for sale must conform to their powers in other respects. If they are authorized by the power to sell on credit, they may sell upon such credit as they are authorized to give; but if the power is silent upon the subject of credit, they cannot sell upon a credit.<sup>4</sup> This rests upon the general principle, that trustees are not authorized to invest the trust funds in promissory notes, nor other mere personal securities;<sup>5</sup> nor are they justified in converting the trust property into mere personal promises of anybody.<sup>6</sup> Sales must generally be made for some particular purposes. If they are made for the purpose of distributing the property, the trustee cannot make the distribution until he has obtained the money, and it is his duty not to endanger the fund by leaving it upon personal security. So if the sale is made as a change of securities, or for the purpose of investment or reinvestment, there can be no excuse for leaving the fund, for any length of time, dependent upon the personal responsibility of any one, especially as the change should not be made until he has his new investment in view.<sup>7</sup> It is *laches* for a trustee not to use all due diligence in collecting all debts due to his estate, and converting them into money;<sup>8</sup>

<sup>1</sup> *Staines v. Morris*, 1 V. & B. 12; *Stephens v. Hotham*, 1 K. & J. 580.

<sup>2</sup> *Campbell v. Johnston*, 1 Sand. Ch. 148.

<sup>3</sup> *Edmunds v. Peake*, 7 Beav. 239.

<sup>4</sup> *Waldron v. McComb*, 1 Hill, 111; 7 Hill, 335; *Ives v. Davenport*, 3 Hill, 373; *Swoyer's App.*, 5 Penn. St. 377; *Hunt v. Fisher*, 1 Harr. & Gill, 88; *Waring v. Darnall*, 10 Gill & J. 126; *Davis's App.* 14 Penn. St. 372.

<sup>5</sup> *Ante*, § 453, and cases cited.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ante*, § 466, and cases cited.

<sup>8</sup> *Ante*, § 441, and cases cited.

and it is greater negligence and maladministration of the trust to convert substantial and tangible property into personal credits. This does not prevent a trustee from making proper terms of sale, and from giving a proper time to the purchaser to examine the title and complete the contract; but the trustee ought not to part with the title before he has received the purchase-money. If, however, the sale is made for a change of investment, the trustee may take a mortgage upon the property sold, if it is real estate; for investments in mortgages of real estate, in the absence of any provision in the instrument of trust to the contrary, are permitted by the law.<sup>1</sup> And where property was sold for a particular purpose, it was permitted to invest the money in exchequer bills, awaiting the accomplishment of the purpose; but exchequer bills are a kind of government security, and are not a mere personal credit.<sup>2</sup> But where a sale is for the purpose of obtaining money for a particular purpose, the sale must be for money, and a sale on credit cannot be authorized or justified.<sup>3</sup>

§ 787. Where the trustees have the legal title and a power of sale, they alone are competent to contract and make a good title to the purchaser.<sup>4</sup> So if they take a mere power which operates under the statute of uses, by revoking the old uses and appointing new ones, they alone can make a good title to the purchaser.<sup>5</sup> So if executors have a power of sale by implication,<sup>6</sup> they may compel the purchaser to a specific performance of the contract without joining the *cestuis que trust* as parties to the suit,<sup>7</sup> and courts will enforce the spe-

<sup>1</sup> Swoyer's App., 5 Barr, 277; Waring v. Darnall, 10 Gill & J. 126.

<sup>2</sup> Matthews v. Brise, 6 Beav. 239.

<sup>3</sup> Davis's Appeal, 14 Penn. St. 372. A sale on credit is said to be the usual and authorized course in North Carolina. Stone v. Hinton, 1 Ired. Eq. 15; and see Carnes v. Polk, 4 Coldw. 187.

<sup>4</sup> Sowarsby v. Lacy, 4 Madd. 142; Keon v. Magawly, 1 Dr. & War. 401.

<sup>5</sup> Titcomb v. Currier, 4 Cush. 591; Sugd. Pow. *passim*.

<sup>6</sup> Tylden v. Hyde, 2 S. & S. 238; Forbes v. Peacock, 11 Sim. 152. But the heir may be directed to join in the conveyance. Blatch v. Wilder, 1 Atk. 420.

<sup>7</sup> Binks v. Rokely, 2 Madd. 227; Keon v. Magawly, 1 Dr. & War. 401;

cific performance of a proper contract of sale,<sup>1</sup> even if the power was ended before the conveyance, if the trustees had the power to make the contract;<sup>2</sup> but any contract that is a breach of the trust will not be enforced, although the purchaser was without fault; he will be left to his remedy at law.<sup>3</sup> If the trustees sell with an agreement that the purchaser may retain a private debt due from them, the court will not enforce the sale.<sup>4</sup> Trustees themselves cannot purchase the estate;<sup>5</sup> (a) but the tenant for life may,<sup>6</sup> and trustees of other estates may purchase.<sup>7</sup> If the contract turns out to be one of great hardship against the trustees, from any misapprehension of all the circumstances of the estate, the court will not enforce its specific performance against them, but will leave the purchaser to his suit at law.<sup>8</sup> Neither the trustee nor a third person can take advantage of his own fraud to defeat the sale; the *cestui que trust* can alone, for such cause, avoid the act.<sup>9</sup>

Drayson v. Pocock, 4 Sim. 283; *In re* London Bridge, 13 Sim. 176; Wake-man v. Rutland, 3 Ves. Jr. 233, 504; 8 Bro. P. C. 145; *Re* Williams's Estate, 5 De G. & Sm. 515; Cottrell v. Cottrell, L. R. 2 Eq. 330; Lloyd v. Griffiths, 3 Atk. 264; Duffy v. Calvert, 6 Gill, 487.

<sup>1</sup> Mortlock v. Buller, 10 Ves. 315; 2 Sugd. Pow. 511.

<sup>2</sup> Mortlock v. Buller, 10 Ves. 315.

<sup>3</sup> Ord v. Noel, 5 Madd. 438; Wood v. Richardson, 4 Beav. 174; Mortlock v. Buller, 10 Ves. 315; Thompson v. Blackstone, 6 Beav. 470; Dawes v. Betts, 12 Jur. 709; Johnston v. Eason, 3 Ired. Eq. 334.

<sup>4</sup> Thompson v. Blackstone, 6 Beav. 470; Miltenberger v. Morrison, 46 Mo. 251.

<sup>5</sup> *Ante* §§ 195-199.

<sup>6</sup> Howard v. Ducane, T. & R. 81; Diconson v. Talbot, 19 W. R. 138; Miltenberger v. Morrison, 46 Mo. 251.

<sup>7</sup> *Ibid.*

<sup>8</sup> Wedgewood v. Adams, 6 Beav. 600; 8 Beav. 103.

<sup>9</sup> Sarco v. Casanueva, 30 Cal. 560.

(a) A trustee, who without fraud the property in trust and is only bids in trust property at a foreclosure sale in his own name, acts on the *cestui's* behalf; he still holds Trust Co. (Minn.), 77 N. W. 428.

## CHAPTER XXVI.

### RIGHTS AND DUTIES OF THIRD PERSONS IN RELATION TO THE TRUST, AND THEIR DUTY OF SEEING TO THE APPLICATION OF THE PURCHASE-MONEY.

- § 788. State of the question in relation to sale.
- § 789. The different powers of trustees.
- § 790. General rule respecting the person to whom money or property must be passed.
- § 791. How the general rule may be controlled. By express words.
- § 792. By powers of attorney.
- § 793. By implication.
- § 794. Where the funds are to be held and invested by the trust.
- § 795. Where the trust is to pay debts and legacies.
- § 796. Where a particular debt to be paid.
- § 797. Discussion of the rule.
- § 798. Rule in the United States.
- § 799. Where trustees have the right to vary the securities.
- § 800. The effect of collusion or fraud.
- § 801. The intention of the testator must be sought at the time the will was made, and is not affected by a change of circumstances.
- §§ 802-805. Who has power to sell where testator makes charges upon his estate, and gives no power of sale.
- Receipts.
- § 806. Trust for sale a joint office, receipts must be joint.
- § 807. Substituted trustees may give receipts.
- § 808. Power to sign receipts after a breach of trust.
- § 809. Rules as to executors in respect to personal estate.
- § 810. Cannot collusively dispose of personal estate.
- § 811. Where the executor has an interest as legatee.
- § 812. Rules in the United States where bonds are required.
- § 813. Rules as to agents.
- § 813 a. Rule where debt is paid before it is due.
- § 814. Rule as to those standing in fiduciary relations.
- § 815. Within what time courts will give relief.
- § 815 a. Right of creditors of *cestui* to reach the income, etc.
- § 815 b. Right of creditors to reach the legal estate.
- § 815 c. *Bona fide* purchasers without notice are protected.

§ 788. IMMEDIATELY connected with the power of trustees to sell the trust property and receive the money is the inquiry, what are the rights and duties of third persons in dealing with the trustees and purchasing the property? This

inquiry embraces two heads: (1) How far the trustees are authorized to sell; and (2) if authorized to sell, how far are the purchasers required to see that the purchase-money is applied to the purposes of the trust?

§ 789. There is a wide difference between the gift of an estate to trustees with a power to sell, and the gift of a power over an estate as a power to sell upon a certain event happening. Thus if a testator gives an estate to trustees for the payment of debts, if the personal assets prove insufficient, the trustees should not sell the estate until it appears that the personal assets are insufficient, or until the estate is wanted for the purposes for which it was given. But a purchaser has no means of investigating the accounts, and determining the amount of the debts due, the amount of the personal assets, or the disposition that has been made of them. All that he can do is to inquire of the executor, and if the executor and trustee are the same person, he would make no progress in the investigation beyond the representations of the trustee. In this case the legal title being in the trustees, they can sell and transfer it, and the title of the purchaser cannot be impeached, if he has acted without fraud or collusion, even though the personal assets prove sufficient to pay the debts.<sup>1</sup> But if the estate itself is not given to the trustees, but a mere power is conferred upon them to sell in case the personal assets are insufficient, the purchaser must act at his peril, and ascertain whether such facts exist that the power to make the sale is complete, or that the events have happened which justify the exercise of the power.<sup>2</sup> In all cases, if the trust is in course of administration in court, the purchaser must consult the proceedings and decrees of the court.<sup>3</sup> But in no case is the purchaser bound to ascer-

<sup>1</sup> *Culpepper v. Aston*, 2 Ch. Cas. 115; *Greetham v. Colton*, 1 Jur. (N. S.) 848; *Shaw v. Borrer*, 1 Keen, 159; *Keene v. Robarts*, 4 Madd. 356; Co. Litt. 290 b; Butl. n. 14.

<sup>2</sup> *Culpepper v. Aston*, 2 Ch. Cas. 116, 221; *Dike v. Ricks*, Cro. Car. 335; *W. Jones*, 327.

<sup>3</sup> *Culpepper v. Aston*, 2 Ch. Cas. 116, 223; *Walker v. Smallwood*, Amb. 676.

tain whether the trustees are not offering *more* of the estate for sale than is necessary; for the purchaser cannot know the exact sum wanted, together with all the incidental costs, charges, and expenses.<sup>1</sup> If, however, the sale is delayed for a great number of years, and there are circumstances naturally leading to a suspicion that there are no debts after such a length of time, the purchaser will be affected by such suspicious circumstances, and put upon his inquiry.<sup>2</sup>

§ 790. If a person holds money or other property in his hands belonging to another, he cannot discharge himself from liability, except by transferring the property or money to the true owner. At law the trustee is the true owner of property that is vested in him, but in equity the *cestui que trust* is the true owner. Hence the complications and doubts that have arisen concerning trustees' receipts, and the duty of purchasers to look to the application of the purchase-money. Thus if an estate is vested in trustees to sell and divide the purchase-money between B. and C., a court of law treats the trustees as the true owners, and their receipts for the purchase-money as valid discharges; but courts of equity treat B. and C., the *cestuis que trust*, as the true owners, and the trustees as mere instruments. Courts of equity, therefore, require that the receipts for the purchase-money shall be signed by the rightful owners, or the purchase-money must be properly applied to their use, according to the terms of the trust, or there can be no such conveyance of the estate as to bar their beneficial interest.<sup>3</sup> If with the assent of the trustee the money actually goes into the hands of part of the *cestuis* of full age who are handling the trust property or a portion of it, the mortgagee and lender has been held not obliged to see to a more strict application of the fund to the purposes of the trust.<sup>4</sup> But the clear general rule is that the purchaser must hold the estates subject to their equities,

<sup>1</sup> Spalding v. Shalmer, 1 Vern. 301.

<sup>2</sup> Pierce v. Scott, 1 Y. & Col. 257.

<sup>3</sup> Weatherby v. St. Giorgio, 2 Hare, 624.

<sup>4</sup> Colesbury v. Dart, 61 Ga. 625.



although he may have paid the money to the trustee. Thus the application of the purchase-money, or the power of the trustees to sign receipts for it, becomes, in equity, a *question of title*,<sup>1</sup> or rather a question of the equitable title, which is the principal thing; for the legal title, without the beneficial use, is of little consequence. Thus the general rule is, that *prima facie* the *cestuis que trust* must sign receipts for the purchase-money, or the purchaser must look to its application. But this rule may be controlled by a great number of circumstances and considerations. The essence of the matter being, that if there is a discretion in the trustee what to do with the funds received from the purchaser, or their application is general and uncertain, or they are to go to persons unborn, or to be reinvested, or for any reason it would be unreasonable and burdensome to require the purchaser to look after the matter and would really amount to constituting him a trustee, he will be free from the control of the general rule.<sup>2</sup> (a)

<sup>1</sup> Forbes v. Peacock, 12 Sim. 521.

<sup>2</sup> Hughes v. Tabb, 78 Va. 313.

(a) Those who deal with a trustee must take notice of the scope of his authority; even purchasers in good faith are not protected when his breach of trust is beyond the scope of his authority. Kirsch v. Tozier, 143 N. Y. 390; Clemens v. Heckscher, 185 Penn. St. 476; Suarez v. De Montigny, 37 N. Y. 503; Jones v. Holladay, 2 App. D. C. 279. A mortgagor may rightly pay the secured debt to the assignee of the mortgagee's trustee, when he has power to change investments, without inquiring whether the assignment was honest or prudent. Spencer v. Weber, 49 N. Y. S. 687.

By the weight of authority, purchasers at a fairly conducted sale, by trustees having general powers,

if they have no notice of a breach of trust, are not now required to see to the application of the purchase-money. Woodward v. Jewell, 140 U. S. 247; Dyett v. Central Trust Co., 140 N. Y. 54; Knoch v. Van Bernuth, 145 N. Y. 643; Austin v. Hatch, 159 Mass. 198; McArthur v. Robinson, 104 Mich. 540; Darnaby v. Watts (Ky.), 28 S. W. Rep. 388; Curd v. Field (Ky.), 45 S. W. 92; Richelieu Hotel Co. v. Miller, 50 Ill. App. 390; Indiana, &c. R. Co. v. Swannell, 157 Ill. 616; Nat. Bank of Commerce v. Smith, 17 R. I. 244; Seldner v. McCreery, 75 Md. 287; Orr v. Rode, 101 Mo. 387; Claiborne v. Holland, 88 Va. 1046; Bank v. Looney, 99 Tenn. 278; Young v. Mutual Life Ins. Co. (Tenn.), 47 S. W. 428; Indiana,

§ 791. First, it may be controlled by the *express* terms of the trust or by statute. For if the settlor expressly provides that the receipts of the trustees shall be sufficient discharges of the purchase-money,<sup>1</sup> the *cestuis que trust* cannot claim in opposition to the instrument that confers upon them all their rights; in other words, they cannot claim under one part of the instrument, and reject the other parts, and if the law of the State which controls the contract releases the purchaser from the duty of watching the application of the purchase-money, of course that also is sufficient. This is the case in New York, where it is provided that no person who shall actually and in good faith pay a sum of money to a trustee, which the trustee as such is authorized to receive, shall be responsible for the proper application of such money according to the trust.<sup>2</sup> But this does not protect one dealing with a trustee who exceeds his powers in receiving the money.<sup>3</sup>

§ 792. Words in a power of attorney or other instrument, authorizing the attorney or trustee "to sign discharges in the name of the assignor or *otherwise*, and to do all other acts, as the *principal might have done*," have been held to make

<sup>1</sup> *Duffy v. Calvert*, 6 Gill, 487.

<sup>2</sup> 1 R. S. 730, § 66.

<sup>3</sup> *Waterman v. Webster*, 108 N. Y. 157.

&c. *R. Co. v. Swannell*, 54 Ill. App. 260; *Whatley v. Oglesby* (Texas), 44 S. W. 44. *Ins. Co. v. Abbott*, 131 Mass. 397; *Spaulding v. Kendrick*, 172 Mass. 71.

A person who receives money or negotiable securities in payment of or as security for an existing debt is not bound to inquire where the money or securities were obtained, as money or a negotiable security, passing from hand to hand to one who rightly receives it for a valuable consideration, carries on its face its own credentials. Merchants'

In Massachusetts, a pre-existing debt is a valuable consideration for a payment made or a security given on account of it. *Goodwin v. Massachusetts Loan & Trust Co.* 152 Mass. 189, 199; *Merchants' National Bank v. Haverhill Iron Works*, 159 Mass. 158; *National Revere Bank v. Morse*, 163 Mass. 383.

receipts signed in pursuance thereof valid;<sup>1</sup> unless such words are controlled by some other part of the instrument.<sup>2</sup> Where, however, trustees were entitled to receive a sum of *stock*, and had power to vary the securities, a receipt signed by them for *cash* was held to be no discharge; though the court intimated, that if there had been any indication that the receiving of cash was intended as a part of the power to vary the securities, the decision might have been the other way.<sup>3</sup> This seems to be a harsh and unnecessary application of the rule. If the receiving of cash, in the process of varying the securities, was no breach of the trust, the receipts of the trustees ought to have been sufficient.<sup>4</sup>

§ 793. In the second place, the rule may be controlled by an implied intention that the trustee shall have the power to give valid receipts for the purchase-money. Thus if a settlor creates a trust for an *immediate* sale, it is clearly implied that a legal and equitable receipt for the purchase-money shall be *signed by some one*, at the time of the sale. There can be no conveyance without payment of the purchase-money, and there can be no payment without a complete discharge. If, therefore, a sale is directed when the *cestuis que trust*, or some of them, are not in existence, or *sui juris*, or of age, or of sufficient capacity to act, there must be an implied intention that the receipts of the trustees shall be valid releases of the purchase-money. It has been held, where an immediate sale was contemplated, and some of the *cestuis que trust* were infants, that the trustees had an implied power of giving valid discharges for the purchase-money.<sup>5</sup>

<sup>1</sup> *Binks v. Rokeby*, 2 Madd. 527; *Desborough v. Harris*, 5 De G., M. & G. 439; *Ottley v. Gray*, 16 L. J. Ch. 512; *Curton v. Jellicoe*, 14 Ir. Ch. 180.

<sup>2</sup> *Brasier v. Hudson*, 9 Sim. 1.

<sup>3</sup> *Pell v. De Winton*, 2 De G. & J. 13.

<sup>4</sup> *Lewin on Trusts*, 333 (5th ed.).

<sup>5</sup> *Sowarsby v. Lacy*, 4 Madd. 142; *Lavender v. Stanton*, 6 Madd. 46; *Breedon v. Breedon*, 1 R. & M. 413; *Balfour v. Welland*, 16 Ves. 151; *Groom v. Booth*, 1 Drew. 548, 566; *Cuthbert v. Baker*, Sugd. V. & P. 842 (11th ed.).

If a trustee is empowered to sell for cash or on credit and pay the money, to an infant *cestui* when he comes of age, the purchaser is not bound to see to the application of the purchase-money, whether the sale be made before or after the *cestui* arrives at maturity.<sup>1</sup> But the mere fact that the *cestuis que trust* are out of the jurisdiction raises no presumption that the settlor intended that the trustees should sign receipts.

§ 794. Again, the general rule is controlled, if a sale is directed, but the proceeds are not to be paid over to the *cestuis que trust*, but are to be held by the trustees upon some special trusts. In such case the implication is plain, that the settlor intended to confide the execution of the trust to the trustees, and that they have power and authority to receive the trust fund and to give receipts.<sup>2</sup> Power of sale and reinvestment relieves the purchaser of any burden of looking after the application of the money.<sup>3</sup> The earlier English lawyers were of opinion, that, in such cases, the purchasers were only required to see to the investment of the trust fund or purchase-money, and that they could not be responsible for any subsequent misapplication.<sup>4</sup>

§ 795. If the trust is to pay debts generally, the purchaser cannot be subject to the rule that he shall see to the applica-

<sup>1</sup> Woodwine v. Woodrum, 19 W. Va. 67.

<sup>2</sup> Doran v. Wiltshire, 3 Swanst. 699; Balfour v. Welland, 16 Ves. 157; Wood v. Harman, 5 Mod. 368; Locke v. Lomas, 5 De G. & Sm. 329; Glynn v. Locke, 3 Dr. & W. 11; Ford v. Ryan, 4 Ir. Ch. 342. See Cox v. Cox, 1 K. & J. 251; Wormeley v. Wormeley, 8 Wheat. 421, 423; Lining v. Peyton, 2 Des. 375; Redheimer v. Pyson, 1 Speer's Eq. 135; Nichols v. Peak, 1 Beasl. Ch. 69; Coonrod v. Coonrod, 6 Ham. 114; Sims v. Lively, 14 B. Mon. 433; Steele v. Levisay, 11 Grat. 454; Potter v. Gardner, 12 Wheat. 499; Clyde v. Simpson, 4 Ohio St. 445; Hauser v. Shore, 5 Ired. Eq. 357; Dalzell v. Crawford, 1 Pars. Eq. 37; Garnett v. Macon, 6 Call, 308; 2 Brock. 185; Williamson v. Morton, 2 Md. Ch. 91.

<sup>3</sup> Guill v. Northern et al., 67 Ga. 345; Van Bokkelen v. Tinges, 58 Md. 53; Keister v. Scott, 61 Md. 507; Turner v. Hoyle, 95 Mo. 337; Mason v. Bank of Commerce, 90 Mo. 452; Hughes v. Tabb, 78 Va. 313.

<sup>4</sup> Booth's Cas. & Opin. 114.

tion of the purchase-money;<sup>1</sup> or if the trust is to pay debts and legacies,<sup>2</sup> or to pay a *particular* debt and all other debts,<sup>3</sup> or to pay legacies,<sup>4</sup> or to pay debts and apply the balance to the support of some one,<sup>5</sup> there can be no obligation to see to the payment of debts and legacies. The law is the same in regard to a mortgagee, when the trustee has power to mortgage to satisfy debts.<sup>6</sup> Such a trust must necessarily require time, and the investigation of long accounts and vouchers: the purchaser could know neither the creditors nor the amounts. Where debts and legacies are to be paid, the debts must first be paid, and as the purchaser

<sup>1</sup> *Forbes v. Peacock*, 11 Sim. 152; 12 Sim. 528; 1 Phil. 717; *Stroughill v. Anstey*, 1 De G., M. & G. 635; *Dowling v. Hudson*, 17 Beav. 248; *Culpepper v. Aston*, 2 Ch. Cas. 223; *Watkins v. Cheek*, 2 S. & S. 205; *Hardwick v. Mynd*, 1 Anst. 109; *Anon.*, *Moseley*, 96; *Johnson v. Kennett*, 3 My. & K. 630; *Rogers v. Skillicorne*, Amb. 189; *Walker v. Smallwood*, id. 677; *Barker v. Devonshire*, 3 Mer. 310; *Abbot v. Gibbs*, 1 Eq. Cas. Ab. 358; *Binks v. Rokeby*, 2 Madd. 238; *Dunch v. Kent*, 1 Vern. 260; *Elliott v. Merryman*, Barn. 78; 1 Lead. Cas. Eq. 40, Eng. and Amer. notes; *Garnett v. Macon*, 2 Brock. 185, 186; 6 Call, 308; *Bruch v. Lantz*, 2 Rawle, 392; *Dalzell v. Crawford*, 1 Pars. Eq. 57; *Smith v. Guyon*, 1 Bro. Ch. 186; *Ithell v. Beane*, 1 Ves. 215; *Lloyd v. Baldwin*, 1 Ves. 215; *Dalton v. Hewen*, 6 Madd. 9; *Ex parte Turner*, 9 Mod. 418; *Gosling v. Carter*, 1 Coll. 644; *Eland v. Eland*, 1 Beav. 235; 4 M. & Cr. 420; *Jones v. Price*, 11 Sim. 557; *Currer v. Walkley*, 2 Dick. 649; 3 Sugd. V. & P. 168 (10th ed.); *Gardner v. Gardner*, 3 Mason, 178; *Potter v. Gardner*, 12 Wheat. 198; *Laurens v. Lucas*, 6 Rich. Eq. 217; *Williams v. Otey*, 8 Humph. 568; *Hauser v. Shore*, 5 Ired. Eq. 357; *Goodrich v. Proctor*, 1 Gray, 570; *Langmead's Trusts*, 7 De G., M. & G. 353; *Conover v. Stotthoff*, 38 N. J. Eq. 55; *Learned v. Tritch*, 6 Col. 442; *White v. Cook*, 73 Ga. 176. The same rule holds, whatever is to be done with the balance after the debts are paid. *Cherry v. Greene*, 115 Ill. 591.

<sup>2</sup> *Ibid.*; *Co. Litt.* 29 b.; *Butl. n.*; *Williamson v. Curtis*, 3 Bro. Ch. 96; *Johnson v. Kennett*, 3 My. & K. 630; 6 Ves. 654, note a; *Page v. Adam*, 4 Beav. 629; *Grant v. Hook*, 13 S. & R. 259; *Cadbury v. Duval*, 10 Barr, 265; *Andrews v. Sparhawk*, 13 Pick. 393; *Sims v. Lively*, 14 B. Mon. 435; *Dewey's Ex'rs v. Ruggles*, 25 N. J. Eq. 35.

<sup>3</sup> *Robinson v. Lowater*, 17 Beav. 592; 5 De G., M. & G. 272.

<sup>4</sup> *Grant v. Hook*, 13 S. & R. 259; *Hannum v. Spear*, 1 Yeates, 553; 2 Dall. 291; *Cryder's App.*, 1 Jones, 72.

<sup>5</sup> *State v. Cincinnati*, 16 Ohio St. 169.

<sup>6</sup> *Pike v. Baldwin*, 68 Iowa, 264.

can be under no obligation to examine into the debts, so he cannot be required to take any action in regard to the legacies; and if one debt is named, but is coupled with others not named, the same considerations apply. In such trusts the testator must be presumed to have intended that his trustees should have the full power to give receipts for the purchase-money, in order to apply it to the purposes pointed out. This must, however, always be subject to the qualification, that the purchaser can in no wise be party or privy to a breach of the trust in the application of the purchase-money.<sup>1</sup>

§ 796. But where the trust is to pay from the proceeds of a sale a particular debt, or scheduled debts only, or to pay certain legacies named, the purchaser must see that the money finds its way into the hands of those to whom it belongs. In such case there is no trust that requires time or discretion. The purchase-money is simply to be distributed to certain known persons in sums easily ascertained, and there is no reason to presume that the settlor intended that the general rule should not apply.<sup>2</sup>

§ 797. In *Stroughill v. Anstey*, Lord St. Leonards said that, "If a trust is created for the payment of debts and legacies, the purchaser or mortgagee shall in no case be bound to see to the application of the money raised. This would

<sup>1</sup> *Dewey's Ex'rs v. Ruggles*, 25 N. J. Eq. 35.

<sup>2</sup> *Doran v. Wiltshire*, 3 Swanst. 701; *Smith v. Guyon*, 1 Bro. Ch. 186; *Rogers v. Skillicorne*, Amb. 189; *Humble v. Bill*, 1 Eq. Cas. Ab. 359; *Abbot v. Gibbs*, id. 358; *Anon.*, *Moseley*, 96; *Spalding v. Shalmer*, 1 Vern. 303; *Elliott v. Merryman*, Barn. 81; *Binks v. Rokeby*, 2 Madd. 238; *Ithell v. Beane*, 1 Ves. 215; *Lloyd v. Baldwin*, id. 173; *Mather v. Norton*, 21 L. J. Ch. 15; *Dunch v. Kent*, 1 Vern. 260; *Culpepper v. Aston*, 2 Ch. Ca. 223; *Johnson v. Kennett*, 3 My. & K. 930; *Horn v. Horn*, 2 S. & S. 448; *Dowman v. Rust*, 6 Rand. 587; *Bugbee v. Sargent*, 23 Maine, 269; *Leavitt v. Wooster*, 14 N. H. 550; *Swasey v. Little*, 7 Pick. 296; *Lupton v. Lupton*, 2 Johns. Ch. 614; *Kemp v. McPherson*, 7 H. & J. 320; *Long v. Long*, 1 Watts, 267; *Hoover v. Hoover*, 5 Barr, 351; *Dalzell v. Crawford*, 1 Pars. Eq. 57; *Duffy v. Calvert*, 6 Gill, 487.

be a consistent rule on which everybody would be able to act, authorized, too, by the words of the testator, and drawing none of those fine distinctions which embarrass courts and counsel, and lead to litigation; and it is one to which I shall adhere as long as I sit in this court.”<sup>1</sup> This rule, thus stated, proceeds upon the ground that, in all cases where a testator has given his trustees a power to sell to pay debts generally, or to pay particular debts, or to pay legacies only, he has reposed a special confidence in the trustees for those purposes, and has declared that they shall execute these trusts; and that purchasers have nothing to do with their execution, and therefore need not look to the application of the purchase-money, whether it is to pay debts generally, or debts and legacies, or particular debts named, or legacies only. Mr. Redfield asserts that this is the true principle, and that the old rule that a purchaser need not look to the application of the purchase-money where the trust is to pay debts generally, or debts and legacies, but must see to its application, where the trust is to pay particular debts or legacies only, rests upon no sound distinction.<sup>2</sup> He admits, however, that the distinction is established and acted upon in the American cases.<sup>3</sup> But a purchaser under a decree of the court need not look to the application of the purchase-money, whatever may be the purpose for which it is to be employed.<sup>4</sup>

<sup>1</sup> *Stroughill v. Anstey*, 1 De G., M. & G. 653. See this case for an admirable discussion of principles and of the prior cases. But see 17 Jurist, pt. ii. 251, where the case is criticised, and the assertion is made, that prior to that case and *Forbes v. Peacock*, 1 Phil. 717, the purchaser was relieved from seeing to the application of the purchase-money in the case of a trust for the payment of debts generally, not from an intention in the settlor, but from the impossibility of the case.

<sup>2</sup> 3 Redf. on Wills, 235. Mr. Lewin, p. 352, thinks this would be the better rule. See also Sugd. V. & P. 844, 848 (11th ed.).

<sup>3</sup> 3 Redf. on Wills, 236; *Andrews v. Sparhawk*, 13 Pick. 393; *Hauser v. Shore*, 5 Ired. Eq. 357; *Cadbury v. Duval*, 10 Pa. St. 265; *Gardner v. Gardner*, 3 Mason, 178; *St. Mary's Church v. Stockton*, 4 Halst. Ch. 520; *Duffy v. Calvert*, 6 Gill, 487.

<sup>4</sup> *Coombs v. Jordan*, 3 Bland, 284, 329; *Wilson v. Davisson*, 2 Rob. (Va.) 385, 412.

§ 798. In the United States, where lands are holden for the payment of the testator's debts, a devise of lands for the payment of particular debts or legacies only, can impose upon the purchaser no obligation to see to the application of the purchase-money; for the reason that the lands being holden to pay all the debts, the purchaser would be compelled to investigate all the testator's business to ascertain whether the purchase-money should be paid to a particular debt or not, or whether it could be applied to the payment of legacies. In all cases where land is sold, by a decree or license of the probate or other court, to pay debts or legacies, the purchaser is exonerated from all responsibility.<sup>1</sup> It may be stated that the strict English rule is not favored by the American courts, although they apply the doctrine in cases where it cannot be avoided.<sup>2</sup>

§ 799. Where trustees have authority to invest and vary the securities, power to sign receipts is implied from the nature of the trust.<sup>3</sup> If they are authorized to invest on security, the borrower has a right to pay, and the trustee must receive the money and give a receipt, though there is no express power given to sign receipts.<sup>4</sup> Where the trustee was directed to invest on security, but real security was not mentioned, and he loaned on mortgage, the court thought it doubtful whether he had power to sign the receipt, and declined to compel a vendee to perform a contract specifically, and take the title.<sup>5</sup> It is said that the authority to sign the receipt in such cases depends upon the *intention*, and that there could be no intention where there was no authority to lend on mortgage. This is a refinement that probably would

<sup>1</sup> Grant v. Hook, 13 S. & R. 259; Cryder's App., 1 Jones, 72; Coombs v. Jordan, 3 Bland, 284, 329; Wilson v. Davisson, 2 Rob. (Va.) 385, 412.

<sup>2</sup> Dalzell v. Crawford, 1 Pars. Eq. 57; Rutledge v. Smith, 1 Busb. Eq. 283; Redheimer v. Pyron, 1 Spears, Eq. 141; Elliott v. Merryman, 1 Lead. Ca. Eq. 40, Amer. notes.

<sup>3</sup> Locke v. Lomas, 5 De G. & Sm. 329.

<sup>4</sup> Wood v. Harman, 5 Madd. 368.

<sup>5</sup> Hanson v. Beverley, Sugd. V. & P. 848 (11th ed.).



not be recognized in our courts, mortgages being among recognized investments in this country. But a power of sale and exchange would not imply a power to sign receipts.<sup>1</sup>

§ 800. But whatever power and authority the trustee may have to receive the purchase-money and give valid receipts and discharges, the purchaser will not be protected by the receipt if there was any collusion between them;<sup>2</sup> or if he had notice, from the intrinsic nature and character of the transaction, that the trustee intended to misapply the purchase-money;<sup>3</sup> or if a suit was pending for the administration of the trust, or to take it out of the hands of the trustees.<sup>4</sup> If the purchaser deals with the trustee long after the trust should have been executed, he is bound to satisfy himself that the trustee is acting in the proper discharge of his duty.<sup>5</sup>

§ 801. The exemption of the purchaser from seeing to the application of the purchase-money depends upon the intention of the settlor at the date of the instrument; such exemption is not affected by circumstances that transpire subsequently; therefore the intention must be obtained from the construction of the instrument under the circumstances existing when it was made, and such construction cannot be changed by a change of circumstances. Thus if a trust is created to pay debts generally, and then to pay legacies and apply the sur-

<sup>1</sup> *Cox v. Cox*, 1 K. & J. 251. Nor a trust to raise money by sale or mortgage. *Locke v. Lomas*, 5 De G. & Sm. 329.

<sup>2</sup> *Rogers v. Skillicorne*, Amb. 189; *Eland v. Eland*, 4 M. & Cr. 427; *Potter v. Gardner*, 12 Wheat. 498; *Garnett v. Macon*, 2 Brock. 185; 6 Call, 308.

<sup>3</sup> *Watkins v. Cheek*, 2 S. & S. 199; *Colyer v. Finch*, 5 H. L. Cas. 923; *Stroughill v. Anstey*, 1 De G., M. & G. 648; *Burt v. Trueman*, 6 Jur. (N. S.) 721; *Eland v. Eland*, 4 M. & Cr. 427; *Williams v. Morton*, 2 Md. Ch. 94; *Clyde v. Simpson*, 4 Ohio St. 445; *Garnett v. Macon*, 2 Brock. 185; 6 Call, 308; *Shaw v. Spencer*, 100 Mass. 388.

<sup>4</sup> *Lloyd v. Baldwin*, 1 Ves. 173.

<sup>5</sup> *Stroughill v. Anstey*, 1 De G., M. & G. 654; *Forbes v. Peacock*, 11 Sim. 502; 12 Sim. 528; 11 M. & W. 637; *Devaynes v. Robinson*, 24 Beav. 93; *McNeille v. Acton*, 2 Eq. R. 21. See *Sabin v. Heape*, 27 Beav. 553; *Redheimer v. Pyron*, 1 Spears, Eq. 134.

plus to certain purposes, and the purchaser knows that all debts have been paid, he will not be compelled to see to the application of the purchase-money to the payment of the legacies, or to the other determined purposes, for the reason that, when the instrument was made the testator could not have intended that the purchaser should see to the application of the purchase-money to the payment of the debts generally, and the other purposes named, and no change of circumstances can change this intention.<sup>1</sup>

§ 802. The question has been raised, Who has the power to sell and give a discharge for the purchase-money, in case a testator *charges* his real estate with certain payments, and then *devises* it to *trustees upon trusts*, which do not require a sale? Can the executor sell? A few cases seem to intimate that he can.<sup>2</sup> But it is said that a mere charge cannot give executors a legal power.<sup>3</sup> On the other hand, it is said that there is no difference between a charge and a trust for the payments to be made, and therefore trustees take the legal estate subject to all the trusts, and, among others, the trust of making the payments charged.<sup>4</sup> This seems to have been the opinion of Lord Hardwicke.<sup>5</sup> Mr. Justice Wilde said

<sup>1</sup> *Johnson v. Kennett*, 3 My. & K. 624, reversing s. c. 6 Sim. 384; *Eland v. Eland*, 4 My. & Cr. 420; *Page v. Adam*, 4 Beav. 269; *Forbes v. Peacock*, 1 Phill. 717, reversing same case, 11 Sim. 152; 12 Sim. 528; *Sabin v. Heape*, 27 Beav. 553; *Stroughill v. Anstey*, 1 De G., M. & G. 653; *Mather v. Norton*, 16 Jur. 309; *Garnett v. Macon*, 2 Brock. 238; 6 Call. 308; *Gosling v. Carter*, 1 Coll. Ch. 648.

<sup>2</sup> *Shaw v. Borrer*, 1 Keen, 559; *Ball v. Harris*, 8 Sim. 485; 4 My. & Cr. 264; *Gosling v. Carter*, 1 Coll. 649; *Robinson v. Lowater*, 17 Beav. 592; 5 De G., M. & G. 272; *Eidsforth v. Armstead*, 2 K. & J. 333; *Wrigley v. Sykes*, 21 Beav. 337; *Storry v. Walsh*, 18 Beav. 568; *Colyer v. Finch*, 5 H. L. Cas. 905; *Hodkinson v. Quinn*, 1 J. & H. 310; *Greetham v. Colton*, 34 Beav. 615.

<sup>3</sup> *Doe v. Hughes*, 6 Exch. 231.

<sup>4</sup> *Elliott v. Merryman*, Barn. 81; 1 Lead. Cas. Eq. 40; *Ex parte Turner*, 9 Mod. 418; *Jenkyns v. Hiles*, 6 Ves. 654, n.; *Bailey v. Ekins*, 7 Ves. 323; *Wood v. White*, 4 M. & C. 482; *Commissioners, &c. v. Wybrants*, 2 Jon. & L. 197; *Forbes v. Peacock*, 12 Sim. 527.

<sup>5</sup> *Ex parte Turner*, 9 Mod. 418; and see *Colyer v. Finch*, 5 H. L. Cas. 922; Mr. Lewin is of the same opinion. Lewin on Trusts, 342, 343.

that there was no difference between a devise of an estate to be sold, and a devise of an estate charged in the trustees' hands with certain payments; that there was no ground for the distinction, either in principle or upon authority.<sup>1</sup> In such case, the money to make the payments charged could not be allowed to go into the hands of the executor, as he has nothing to do with the real estate.<sup>2</sup> There seems to be no doubt that the trustee, with the concurrence of the executor, can make a good title;<sup>3</sup> but it may happen that such concurrence cannot be had. If a testator charges certain payments upon real estate, and then devises the real estate to a devisee to hold absolutely, the devisee can sell the estate, and give valid receipts and discharges for the purchase-money.<sup>4</sup> (a)

§ 803. If a testator charges payments to be made upon his real estate, but does not devise it, and it descends to his heirs, can they sell it and give valid receipts and discharges for the purchase-money? It is clear that they cannot, for they take nothing under the will; and the testator has not expressly, nor by implication, appointed them trustees to

<sup>1</sup> *Andrews v. Sparhawk*, 13 Pick. 401.

<sup>2</sup> *Gosling v. Carter*, 1 Coll. 650.

<sup>3</sup> *Hodkinson v. Quinn*, 1 John. & H. 303; *Cook v. Dawson*, 29 Beav. 126; 3 De G., F. & J. 127; *Shaw v. Borrer*, 1 Keen, 559; *Ball v. Harris*, 8 Sim. 485; 4 My. & C. 264; *Page v. Adam*, 4 Beav. 269; *Forbes v. Peacock*, 11 Sim. 152; 12 Sim. 528; 11 M. & W. 630; 1 Phill. 717; *Sabin v. Heape*, 27 Beav. 553.

<sup>4</sup> *Bailey v. Ekins*, 7 Ves. 323; *Commissioners, &c. v. Wybrants*, 2 Jon. & L. 198; *Elton v. Harrison*, 2 Swanst. 276, n.; *Elliott v. Merryman*, Barn. 78; *Doe v. Hughes*, 6 Exch. 231; *Eland v. Eland*, 1 Beav. 234; *Dalton v. Young*, 6 Madd. 9; *Johnson v. Kennett*, 6 Sim. 384; 3 My. & K. 624; *Page v. Adam*, 4 Beav. 269; *Colyer v. Finch*, 5 H. L. Cas. 905; *Jenkyns v. Hiles*, 6 Ves. 654; *Ball v. Harris*, 4 My. & C. 267; *Wood v. White*, id. 482; *Ex parte Turner*, 9 Mod. 418; *Andrews v. Sparhawk*, 13 Pick. 393.

(a) A devisee who accepts the devise of land subject to a charge, like an annuity, becomes personally responsible therefor, even when there is sufficient personal estate to pay the annuity. *Wyckoff v. Wyckoff*, 48 N. J. Eq. 113; *Redfield v. Redfield*, 126 N. Y. 466.

make the payments.<sup>1</sup> They may sell the estate and pass the legal title, and if they make the payments no questions can be raised; but if they misapply the money, the land would still be holden for the payments; that is, the purchaser in such cases would be bound to see to the application of the purchase-money. If the heirs are under disabilities, as infants or married women, can the executor sell the estate for the payment of the charges upon it? In *Doe v. Hughes*, the court held that a *charge* had no operation in law, but must be enforced in equity, from which it follows that the executors could not sell without a license or decree of the court.<sup>2</sup> This case has been much criticised on the ground that where a direction to sell and make payments is given, but no person is named, the executors have the power to sell by implication; and so it is thought that where there are charges upon real estate, there is an implied power of sale in the executors.<sup>3</sup> Mr. Lewin thinks that *Doe v. Hughes* was a sound decision upon the *legal* question, but that the executors have an equitable power of sale, and the holders of the legal title are trustees for them.<sup>4</sup> Even upon this statement of the rights and powers of the parties, it is clear that there must be a decree or license for sale from some court having jurisdiction, if the holders of the legal title are under liabilities.

§ 804. If a testator charges payments to be made upon his real estate, and then devises it subject to the charges, and the devisee dies in the testator's lifetime, can the heirs sell and give valid discharges for the purchase-money? The

<sup>1</sup> *Gosling v. Carter*, 1 Coll. 650; *Robson v. Flight*, 34 Beav. 110; 5 N. R. 344; *Forbes v. Peacock*, 11 M. & W. 638; *Doe v. Hughes*, 6 Exch. 231.

<sup>2</sup> *Doe v. Hughes*, 6 Exch. 231.

<sup>3</sup> *Robinson v. Lowater*, 17 Beav. 601; *Wrigley v. Sykes*, 21 Beav. 337; *Storry v. Walsh*, 18 Beav. 568; *Sabin v. Heape*, 27 Beav. 553; *Hodkinson v. Quinn*, 1 John. & H. 309; *Cook v. Dawson*, 29 Beav. 123; 3 De G., F. & J. 127; *Greetham v. Colton*, 34 Beav. 615; *Forbes v. Peacock*, 11 M. & W. 630; *Tylden v. Hyde*, 2 S. & S. 238; *Bentham v. Wiltshire*, 4 Madd. 44; *Re Wise*, 5 De G. & Sm. 415; *Eidsforth v. Armstead*, 2 K. & J. 333; *Sugd. Pow.* 129 (8th ed.); *Colyer v. Finch*, 5 H. L. Cas. 922.

<sup>4</sup> *Lewin*, 346.

case stands as if no devisee had been named, but the estate had been allowed to descend to the heir.<sup>1</sup> There is no doubt that the executor cannot sell, as the testator has expressly appointed a devisee who might have sold as trustee for the payment of the charges: the heir may sell and pass the legal title; but if he misapplies the purchase-money, the land would still be holden for the charges.<sup>2</sup>

§ 805. If a testator charges payments to be made upon his real estate, and devises the same to A. for life with *contingent remainders* or *other limitations* which render it impossible that the *devisees* can sell under an implied power,<sup>3</sup> the court will, if possible, imply a power of sale in the executors, on the ground that where there are charges that require a sale, and it is impossible for the devisees to sell, and no person is named to sell, there must be an implied power to sell in the executors. Courts in England give this construction to such bequests to avoid a suit in chancery for a sale;<sup>4</sup> but in the United States the proper course would be for the executors to apply to the court of probate for a license to sell and make the payments ordered. Mr. Lewin says that the true principle which ought to govern in these cases is this, that where a testator devises an estate to trustees or to a beneficiary, and charges payments to be made, then the trustees or the beneficiary should have a power of sale and of signing receipts; but where a testator charges payments, and does not devise the estate, or devises it in such manner that there is no one who can execute the trust, then the executors should have an equitable power of sale and of signing receipts, and that the depositaries of the legal title should be trustees for

<sup>1</sup> See *ante*, § 803. But see *Hardwick v. Mynd*, 1 Anst. 109; *Austin v. Martin*, 29 Beav. 523.

<sup>2</sup> See *ante*, § 803. But see *Hardwick v. Mynd*, 1 Anst. 109; *Austin v. Martin*, 29 Beav. 523.

<sup>3</sup> *Gosling v. Carter*, 1 Coll. 644; *Eidsforth v. Armstead*, 2 K. & J. 333; *Wrigley v. Sykes*, 21 Beav. 337; *Bolton v. Stannard*, 4 Jur. (N. S.) 576; *Robinson v. Lowater*, 17 Beav. 592; 5 De G., M. & G. 272; *Sabin v. Heape*, 27 Beav. 553. But see *Doe v. Hughes*, 6 Exch. 223.

<sup>4</sup> *Lewin*, 348.

them, and bound to convey as they direct; but where the testator has devised the estate, and therefore provided a hand to execute the trust, but the trustee or devisee dies in the testator's lifetime, then, as the hand to execute the trust has only failed by the act of God, no person has a power of sale or signing receipts, but the trust can only be executed by the court.<sup>1</sup> By Lord St. Leonards's act, as it is called, executors in all the cases before named, when the wills shall come into operation after August 13, 1859, may make sales and give valid receipts for the purchase-money.<sup>2</sup> In the United States, it is conceived that executors would have the power of selling by applying to the Court of Probate for a license or decree to sell so much of the estate as is necessary to discharge the payments to be made; and, as before stated, whenever executors or trustees sell under a license or decree of court, the purchaser need not look to the application of the purchase-money.<sup>3</sup> Where there is a devise of an estate, subject to the payment of charges, the devisee, with the concurrence of the executors, declaring that all *charges have been paid*, may sell for his own private purposes, and give a good and valid title to the purchaser, without any obligation on the purchaser to make further investigations as to the application of the purchase-money.<sup>4</sup>

§ 806. A trust for sale is a joint office, and the receipt must be signed by all the trustees who act; but it need not be signed by one who disclaims.<sup>5</sup> Where a power is given to trustees to sign receipts and exonerate the purchaser from seeing to the application of the purchase-money, the receipt must be signed by all the trustees, even if one of them has conveyed his interest in the trust estate to his cotrustees; for the power to sign the receipt was a personal confidence

<sup>1</sup> Lewin, 348, 349.

<sup>2</sup> 22 & 23 Vict. c. 35.

<sup>3</sup> *Ante*, § 798.

<sup>4</sup> *Storry v. Walsh*, 18 Beav. 559; *Howard v. Chaffers*, 2 Dr. & Sm. 236.

<sup>5</sup> *Adams v. Taunton*, 5 Madd. 435; *Hawkins v. Kemp*, 3 East, 410; *Smith v. Wheeler*, 1 Vent. 128.

that did not pass with the estate.<sup>1</sup> (a) So the trustees cannot delegate their power of signing receipts to exonerate the purchaser; as, if they convey the estate to another upon the same trusts upon which they held, a purchaser could not safely pay the purchase-money to such grantee without seeing to its application. The case of *Hardwick v. Mynd* seems to uphold a different rule; but it would not be safe to act upon it.<sup>2</sup> But if the trustees sign the receipt, the purchaser need not pay the money to them personally; he may pay to any person properly authorized by them to receive it; or he may pay it as the trustees direct it to be paid into a bank, or to any other person;<sup>3</sup> yet it is safer to pay to the trustees personally.<sup>4</sup> If, in such case, the person authorized to receive the money upon the receipts of the trustees misapplies it, the trustees will be responsible to the *cestui que trust* for the loss.<sup>5</sup>

§ 807. If trustees for sale, with a power to sign receipts for the purchase-money, die, and new trustees are appointed by the court to execute the power of sale, such new trustees may also give valid receipts. But this is an exception to the ordinary rule, that trustees appointed by court do not take the special powers conferred upon the trustees appointed by

<sup>1</sup> *Crewe v. Dicken*, 4 Ves. 97.

<sup>2</sup> *Hardwick v. Mynd*, 1 Anst. 109; *Braybroke v. Inskip*, 8 Ves. 432.

<sup>3</sup> *Hope v. Liddell*, 21 Beav. 202; *Miller v. Priddon*, 1 De G., M. & G. 335; *Lock v. Lomas*, 5 De G. & Sm. 326; *McCarogher v. Whieldon*, 34 Beav. 107.

<sup>4</sup> *Pell v. De Winton*, 2 De G. & J. 13; *In re Fishbourne*, 9 Ir. Eq. 340.

<sup>5</sup> *Ghost v. Waller*, 9 Beav. 497. Solicitors who were employed by two trustees to collect trust funds, having paid over to one without receipt of the other, were held liable for a loss by breach of trust by the trustee to whom they paid. *Lee v. Sankey*, L. R. 15 Eq. 204.

(a) The purchaser may be bound to look to the application of the purchase-money even when the trustee is the proper person to give the receipt; a trustee cannot give an effectual release without the concurrence of his beneficiaries, and the statute of limitations does not apply until such a receipt can be given. *Barcroft v. Murphy*, [1896] 1 I. R. 590, 598.

the settlor. The exception is made in cases of sales, for the reason that the power of giving receipts is so connected with the power of sale that it may be presumed to be the intention of the settlor.<sup>1</sup>

§ 808. A perplexing question has arisen, whether trustees, who have a clear authority given them to sign receipts, have the same power remaining after a breach of the trust. Thus, if trustees suffer the property to pass to A. by a breach of trust, and A. afterwards passes the property back to the trustees, would the receipt of the trustees be a valid discharge of A., so that he could not be called upon to account for the property if the trustees again misapplied it? If the property comes back to the trustees *in specie*, so that it is exactly as if it had never passed out of their hands, it would seem that their grantee should not be further responsible. But if the property has been converted, and comes back in the form of payment, it would seem that the receipt of the trustees would not indemnify the person who has knowingly dealt with the property by aiding in committing a breach of trust.<sup>2</sup> Mere irregularity of appointment, however, will not vitiate a receipt; as, where one of two trustees was irregularly appointed, the receipt of both was held a good discharge.<sup>3</sup> If the trust property is mortgaged, the trustees may give receipts for the difference between the amount of the mortgage and the purchase-money. If there is no sur-

<sup>1</sup> Drayson *v.* Pocock, 4 Sim. 283; Byam *v.* Byam, 19 Beav. 58; Bartley *v.* Bartley, 5 Drew. 385; Lord *v.* Bunn, 2 Y. & Col. Ch. 98.

<sup>2</sup> Lander *v.* Weston, 3 Drew. 389; Hanson *v.* Beverley, Sugd. V. & P. 848 (11th ed.); Carver *v.* Richards, Lewin, 350. In Sheridan *v.* Joyce, 7 Ir. Eq. 118, the defendant borrowed the trust fund in breach of the trust, not knowing that it was trust-money. He afterwards discovered that fact, and repaid the money to the trustee and took his receipt. The court held that when defendant discovered that he held the trust money in breach of the trust, he became *quasi trustee* and responsible to the *cestui que trust* for the money, and that he could not discharge himself from his liability by paying the original trustee and taking his receipt alone.

<sup>3</sup> Miller *v.* Priddon, 1 De G., M. & G. 335. But see Gosling *v.* Carter, 1 Col. C. C. 650.



plus, the trustees can convey without giving a receipt. In the United States, the forms of conveyance contain a receipt of the purchase-money or consideration; and as deeds must be signed by all the trustees to whom the power is intrusted, the receipt is signed in the same instrument. But if the deed or conveyance does not contain a receipt, or if the full amount of the purchase-money is not named in the deed as the consideration of the purchase, a separate receipt should be given, signed by all the trustees; otherwise the purchaser would have no sufficient discharge, and he might be called upon to account.

§ 809. On the death of a testator, the personal estate vests wholly in the executor, and in order that he may execute his office, the law permits him, with or without the concurrence of any coexecutor,<sup>1</sup> to sell or mortgage,<sup>2</sup> by actual assignment or equitable deposit,<sup>3</sup> with or without a power of sale,<sup>4</sup> all or any part of the personal assets, legal or equitable.<sup>5</sup> He must render an account to the court; but no creditor, legatee, or heir can make any claim to any of the personal assets. The creditor can only pursue his legal claim against the executor personally.<sup>6</sup> The pecuniary or specific legatee is not entitled to the legacy until it is assented to by the executor;<sup>7</sup>

<sup>1</sup> *Scott v. Tyler*, 2 Dick. 725; *Smith v. Everett*, 27 Beav. 446; *Sneesby v. Thorn*, 7 De G., M. & G. 399; *Fellows v. Mitchell*, 2 Vern. 515; *Doe v. Stace*, 15 M. & W. 623; *Murrell v. Cox*, 2 Vern. 570; *Shep. Touch.* 484; *Dyer*, 23 a.

<sup>2</sup> *Ibid.*; *Bonney v. Ridgard*, 1 Cox, 145, 148; *Miles v. Durnford*, 13 Eng. L. & Eq. 123; 2 De G., M. & G. 641; *Mead v. Orrery*, 3 Atk. 340; *Andrew v. Wrigley*, 4 Bro. Ch. 138; *Keane v. Roberts*, 4 Madd. 357; *Humble v. Bill*, 2 Vern. 446; *Sandars v. Richards*, 2 Coll. 568; *McLeod v. Drummond*, 17 Ves. 154; *Haynes v. Forshaw*, 11 Hare, 93; *Field v. Schieffelin*, 7 Johns. Ch. 150; *Petrie v. Clark*, 11 S. & R. 377; *Tyrrell v. Morris*, 1 Dev. & Bat. Eq. 559.

<sup>3</sup> *Ibid.*; *Ball v. Harris*, 8 Sim. 485.

<sup>4</sup> *Russell v. Plaice*, 18 Beav. 21.

<sup>5</sup> *Shaw v. Spencer*, 100 Mass. 392; *McLeod v. Drummond*, 14 Ves. 360; *Nugent v. Gifford*, 1 Atk. 463.

<sup>6</sup> *Ibid.*; *Mead v. Orrery*, 3 Atk. 238.

<sup>7</sup> *Ibid.*

and the residuary legatee has no claim or lien until the estate has been liquidated, and all liabilities under the will have been settled.<sup>1</sup> Therefore, upon the sale of a chattel, the purchaser has no concern as to the purchase-money, and the conveyance need not state that the sale is necessary to pay debts or other liabilities.<sup>2</sup> The purchaser may rely upon the person appointed by the testator to liquidate his estate.<sup>3</sup> If the executor misapplies the purchase-money, those defrauded must seek their remedy against him, and not against the purchaser.<sup>4</sup> The purchaser need not inquire into the necessity of a sale.<sup>5</sup> Even express notice of the entire contents of a will cannot affect the purchaser of a chattel; for a purchaser of real estate under a power of sale to pay debts is not bound to investigate whether there are debts, nor to see to the application of the purchase-money. And as all personal property is bound for the payment of debts, a purchaser is not bound to know whether there are debts or not, nor to see to the application of the purchase-money.<sup>6</sup> Thus an executor can sell the personal assets of his testator, and even chattels specifically devised; and the purchaser has no concern with the purchase-money.<sup>7</sup>

§ 810. While this is the general rule, executors and purchasers cannot collude and commit frauds, for fraud and collusion vitiate every transaction; therefore, if there is fraud, a purchaser cannot protect himself under the absolute power of the executor to sell.<sup>8</sup> Thus the sale of a chattel

<sup>1</sup> Ibid.

<sup>2</sup> *Bonney v. Ridgard*, 1 Cox, 148.

<sup>3</sup> Ibid.

<sup>4</sup> *Humble v. Bill*, 2 Vern. 445; *Ewer v. Corbet*, 2 P. Wms. 149; *Watts v. Kancie, Toth.* 77; *Nurton v. Nurton*, id.; *Ward v. Ward*, 4 Ir. Ch. 215; *Pa. Ins. Co. v. Austen*, 42 Penn. St. 257.

<sup>5</sup> *Nugent v. Gifford*, 1 Atk. 464; *Mead v. Orrery*, 3 Atk. 242.

<sup>6</sup> *Keane v. Robarts*, 4 Madd. 356; *Burting v. Stonard*, 2 P. Wms. 150.

<sup>7</sup> *Watts v. Kancie, Toth.* 77, 161; *Ewer v. Corbet*, 2 P. Wms. 148; *Humble v. Bill*, 2 Vern. 444; 1 Bro. P. C. 71; *Andrew v. Wrigley*, 4 Bro. Ch. 137; *McLeod v. Drummond*, 17 Ves. 160; *Bonney v. Ridgard*, 1 Cox, 147.

<sup>8</sup> *Scott v. Tyler*, 2 Dick. 725; *Watkins v. Cheek*, 2 S. & S. 205; *Mc-*

cannot stand, if it is sold for a nominal price only, or at a fraudulent undervalue, or for any collusive purpose;<sup>1</sup> or if the purchaser receives the chattel in payment of the executor's own debt to him;<sup>2</sup> or if the purchaser knows that the executor intends to misapply the money, and the sale is made for that purpose.<sup>3</sup> Nor can a purchaser buy from an executor a chattel specifically bequeathed, if he has notice or knowledge that all debts have been paid, and that such chattel is not required for the payment of debts.<sup>4</sup> Nor can the executor apply the chattels with knowledge of the purchaser to the payment of a debt wrongfully contracted by him in behalf of the estate.<sup>5</sup> Nor can an executor sell or pledge the assets to raise money to carry on the testator's business, though

*Leod v. Drummond*, 17 Ves. 154; *Hill v. Simpson*, 7 Ves. 166; *Taner v. Ivie*, 2 Ves. 469; *Keane v. Robarts*, 4 Madd. 357; *Crane v. Drake*, 2 Vern. 616; *Nugent v. Gifford*, 1 Atk. 463; *Mead v. Orrery*, 3 Atk. 240; *Bonney v. Ridgard*, 1 Cox, 147; *Whale v. Booth*, 4 T. R. 625; *Elliot v. Merryman*, Barn. 81; 1 Lead. Cas. Eq. 77, notes; *Williams v. Branch Bank*, 7 Ala. 906; *Dodson v. Simpson*, 2 Rand. 294; *Williamson v. Morton*, 2 Md. Ch. 94; *Wilson v. Doster*, 7 Ired. Eq. 231; *Miller v. Williamson*, 5 Md. 219.

<sup>1</sup> *Scott v. Tyler*, 2 Dick. 725; *Ewer v. Corbet*, 2 P. Wms. 149; *McMullen v. O'Reilly*, 15 Ir. Ch. 251; *Drohan v. Drohan*, 1 B. & B. 185; *Joyner v. Conyers*, 6 Jones, Eq. 78.

<sup>2</sup> *Shaw v. Spencer*, 100 Mass. 392; *Andrew v. Wrigley*, 4 Bro. Ch. 187; *Eland v. Eland*, 4 M. & Cr. 127; *Miles v. Durnford*, 13 Eng. L. & Eq. 123; 2 De G., M. & G. 641; *Anon.*, Pr. Ch. 434; *Williams v. Branch Bank*, 7 Ala. 906; *Dodson v. Simpson*, 2 Rand. 294; *Williamson v. Morton*, 2 Md. Ch. 94; *Wilson v. Doster*, 7 Ired. Eq. 231; *Miller v. Williamson*, 5 Md. 219; *Scott v. Tyler*, 2 Dick. 712; *Hill v. Simpson*, 7 Ves. 152; *Watkins v. Cheek*, 2 S. & S. 205; *Keane v. Robarts*, 4 Madd. 357; *Crane v. Drake*, 2 Vern. 616; *Austin v. Wilson*, 21 Ind. 252; *Pendleton v. Fay*, 2 Paige, 202.

<sup>3</sup> *Watkins v. Cheek*, 2 S. & S. 199; *Eland v. Eland*, 4 M. & Cr. 427; *Stroughill v. Anstey*, 1 De G., M. & G. 648; *Sacia v. Berthoud*, 17 Barb. 15; *Miller v. Williamson*, 5 Md. 219; *Williamson v. Morton*, 2 Md. Ch. 94; *Garrard v. Railroad Co.*, 5 Casey, 154; *Railway Co. v. Barker*, id. 160; *Champlin v. Haight*, 10 Paige, 274; *Shaw v. Spencer*, 100 Mass. 387.

<sup>4</sup> *Ewer v. Corbet*, 2 P. Wms. 149; *McMullen v. O'Reilly*, 15 Ir. Ch. 251.

<sup>5</sup> *Collinson v. Lister*, 20 Beav. 356; 7 De G., M. & G. 634; *Hill v. Simpson*, 7 Ves. 169.

such business is carried on in pursuance of directions contained in his will; for such debts are the executor's own debts and not the debts of the estate. The executor can only apply the special property devoted to the purposes of the business he is directed to carry on.<sup>1</sup>

§ 811. If the executor is the specific or residuary legatee, he may sell the testator's chattels to pay his own debt, for as soon as the testator's debts are paid, the chattels belong to the executor as legatee, and a purchaser is not bound to know whether the testator's debts are paid;<sup>2</sup> but if the creditor of the executor has actual knowledge that the testator's debts or any one of them are unpaid, he cannot receive such assets in payment of his own debts, although the executor is residuary legatee.<sup>3</sup> If the executor is joint residuary legatee, his creditor cannot take any of the assets in payment of debts; he cannot take them from the executor, *qua* executor, because the executor cannot pay his own debts from the assets of the estate, and the creditor cannot receive the assets from him, *qua* legatee, for the reason that others own the assets with him after the testator's debts are paid;<sup>4</sup> the purchaser in such case must not rely upon the representations of the executor, but he is bound to examine the will.<sup>5</sup> Where a creditor receives assets from an executor in payment, knowing that such assets belong to the executor only as executor, a suspicion of fraud at once arises; but if an executor applies for a loan, and the party applied to parts with his money on security of the assets, there is no presumption of fraud. Therefore, if an executor sells or mortgages personal assets for ready money, or money to be

<sup>1</sup> *McNeille v. Acton*, 2 Eq. R. 21.

<sup>2</sup> *Taylor v. Hawkins*, 8 Ves. 209; *Nugent v. Gifford*, 1 Atk. 463; 4 Bro. Ch. 136; *Storry v. Walsh*, 18 Beav. 559; *Mead v. Orrery*, 3 Atk. 235; *McLeod v. Drummond*, 17 Ves. 163; *Whale v. Booth*, 4 T. R. 625, note (a); *Bedford v. Woodham*, 4 Ves. 40, n.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Bonney v. Ridgard*, 1 Cox, 145; *Hill v. Simpson*, 7 Ves. 152, 170; *Haynes v. Forshaw*, 11 Hare, 93.

<sup>5</sup> *Hill v. Simpson*, 7 Ves. 152, 170.

advanced, the dealing *prima facie* is in due course of administration, but *prima facie* only; for if there is affirmative evidence that the purchaser or mortgagee had notice that the money was to be used for some purpose other than in the settlement of the estate, the court will regard the transaction as fraudulent, and will not allow it to stand.<sup>1</sup>

§ 812. In the United States, bonds are required of both executors and administrators, for the protection of the estate and the parties interested; but neither such bonds nor a judgment upon them vest the assets in the executor or administrator in his own right.<sup>2</sup> But it is conceived, where there are no statutes to the contrary, that executors and administrators may sell the personal assets, acting in good faith, and receive the purchase-money, and length of time will not affect their right. As personal assets go to the personal representatives, if the executor or administrator cannot sell and receive the purchase-money, who can?<sup>3</sup> An executor has no power until he has proved the will and given bonds; until then he can neither sell the assets, nor make a valid contract binding upon the estate, nor receive the purchase-money.<sup>4</sup>

§ 813. An agent of an executor or administrator or of a trustee is accountable only to his principal; therefore a broker or other agent employed by an executor cannot refuse to pay over money to his principal, because it may be misapplied; but if such agent receives any benefit from the breach

<sup>1</sup> *Ante*, § 224; *McLeod v. Drummond*, 14 Ves. 362; 17 Ves. 155; *Miles v. Durnford*, 2 De G., M. & G. 641; *Scott v. Tyler*, 2 Dick. 172; *Keane v. Roberts*, 4 Madd. 358; *Pendleton v. Fay*, 2 Paige, 202.

<sup>2</sup> *Atkinson v. Atkinson*, 8 Allen, 15; *Barker v. Barker*, 14 Wis. 131.

<sup>3</sup> *Stroughill v. Anstey*, 1 De G., M. & G. 654; *Ewer v. Corbet*, 2 P. Wms. 148; *Court v. Jeffery*, 1 S. & S. 105; *Orrock v. Binney*, Jac. 523; *Pierce v. Scott*, 1 Y. & Col. 257; *Forbes v. Peacock*, 11 Sim. 152; *Williams v. Massey*, 15 Ir. Ch. 68; *Lay v. Duckett*, 1 Cr. & Ph. 305; *Field v. Schieffelin*, 7 Johns. Ch. 150; *Petrie v. Clark*, 1 S. & R. 377.

<sup>4</sup> *Newton v. Metropolitan Rail. Co.*, 1 Dr. & Sm. 583; *Luscomb v. Ballard*, 5 Gray, 403.

of the trust he will be responsible for the property to the party entitled to the beneficial interest.<sup>1</sup> (a)

§ 813 a. A debtor may pay a debt before it is due in good faith and be under no liability though the trustee does not pay over the money; for example, the case of county officers.<sup>2</sup>

§ 814. A trustee may generally sell the personal property belonging to his trust estate, especially if he have authority to change the securities, or vary the investments; and if he sells the personal property and receives the purchase-money in good faith, the purchaser will take a good title, and will be protected from loss, although the trustee afterwards misapplies the money. If it appears to the purchaser that he is purchasing trust property, he will be put upon no inquiry, except to ascertain whether the trustee has power to change or vary the securities.<sup>3</sup> If the instrument of trust is silent upon the power of varying the securities, it is to be determined upon the whole scope and purpose of the trust, whether the trustee has, in fact, the power to dispose of the property. If it appears to the purchaser in any way, either from words upon the face of the securities or by any other form of notice, either actual or constructive, that the sale is made in breach of the trust, or for the purpose of misapplying the money, or to secure a private debt of the trustee, the purchaser will be accountable to the *cestui que trust*, or other person entitled

<sup>1</sup> Pannel v. Hurley, 2 Coll. C. C. 241; Bodenham v. Hoskyns, 2 De G., M. & G. 241; Bennett v. Merritt, 6 Jones, Eq. 263.

<sup>2</sup> Jacks v. State, 44 Ark. 73.

<sup>3</sup> *Ante*, § 225.

(a) See *supra*, § 246. A trustee is justified in using his discretion in employing a broker of good credit to make investments, and he may pay the purchase-money of securities to him when such is the usual and regular course of business. See *supra*, § 246; *In re* Robinson v. Harkin, [1896] 2 Ch. 415. The burden is not on him to show that a loss from employing an agent to collect was not due to his own fault. See *supra*, § 246; *In re* Brier, 26 Ch. D. 238; *Rochfort v. Speight v. Gaunt*, 9 A. C. 1; 22 Ch. D. 727; *In re* Weall, 42 Ch. D. 674; *Seaton*, [1896] 1 I. R. 18.

to call for the property, and he must account for all the damages which have arisen from his concurrence in the breach of the trust and the misapplication of the money.<sup>1</sup> (a)

<sup>1</sup> *Ante*, §§ 800, 809-813; *post*, §§ 828-843; *Sturtevant v. Jaques*, 14 Allen, 523; *Bancroft v. Cousen*, 13 Allen, 50; *Trull v. Trull*, *id.* 407; *Bingham v. Stewart*, 13 Minn. 106; *Pratt v. Beaupre*, *id.* 187. See *Leitch v. Wells*, 48 Barb. 637; 48 N. Y. 597; *Ashton v. Atlantic Bank*, 3 Allen, 219. In *Shaw v. Spencer*, 100 Mass. 382, stock standing in the name of a person as "trustee" was pledged to secure the payment of a private debt. A bill in equity was brought by a person beneficially interested in the stock. The case was most elaborately argued by able counsel, and as the law was very fully discussed and stated by the court, Foster, J., the opinion is given here in place of a more full discussion in the text:—

"Under the circumstances disclosed in the evidence, it was a flagrant breach of trust and a criminal fraud to transfer the certificates of stock to Spencer, Vila, & Co. They were the property of the plaintiff, who is entitled to reclaim them from any one but a *bona fide* holder for value without notice. Charles Mellen, a member of the firm of Mellen, Ward, & Co., as collateral security for a debt due from that firm to Spencer, Vila, & Co., handed to them two certificates of stock in the Calumet Mining Company for one thousand shares each, standing in the name of another member of that firm, namely, 'E. Carter, trustee,' and by him transferred in blank. Spencer, Vila, & Co. received the certificates thus indorsed in blank with the name of E. Carter, trustee, for a valuable and adequate consideration, without other or any defect in title than such as the law may impute from the word 'trustee' in the body of the certificates and after the signature of Carter upon the blank transfers.

"It is clear that a certificate of stock transferred in blank is not a negotiable instrument. *Sewall v. Boston Water Power Co.*, 4 Allen, 282. Each of these certificates is expressed on its face to be 'transferable only on the books of the company by the holder hereof in person, or by a conveyance in writing recorded in said books, and surrender of this certificate.' No commercial usage can give to such an instrument the attributes of negotiability. However many intermediate hands it may pass through whoever would obtain a new certificate in his own name must fill out the blanks as they were filled in the present instance, so as to derive title to himself directly from the last recorded stockholder, who is the only recognized and legal owner of the shares.

"It cannot possibly be material whether the manual delivery of the certificates was by Mellen or by Carter himself. Unless the word 'trustee'

(a) As to notice to the corporation whose stock is transferred, and its duty to inquire as to the terms of the trust, see *supra*, § 225; *Marbury v. Ehlen*, 72 Md. 206.

Where trust funds are misapplied by a trustee, and the person dealing with him is aware of the character of the funds,

may be regarded as mere *descriptio personæ* and rejected as a nullity, there was plain and actual notice of the existence of a trust of some description. A trust as to personalty or *choses in action* need not be expressed in writing, but may be established by parol. And that the mere use of the word 'trustee' in the assignment of a mortgage and note imports the existence of a trust, and gives notice thereof to all into whose hands the instrument comes, has been expressly decided by this court. *Sturtevant v. Jaques*, 14 Allen, 523. See also *Bancroft v. Cousen*, 13 Allen, 50, and *Trull v. Trull*, *ibid.* 407. It is insisted, on behalf of the defendants, that, even if there was actual notice of the existence of a trust, there was no notice of its character, and that the trust might have been such as to authorize the transfer which was made by Carter. But, in our opinion, the simple answer to this position is, that, where one known to be a trustee is found pledging that which is known to be trust property, to secure a debt due from a firm of which he is a member, the act is one *prima facie* unauthorized and unlawful, and it is the duty of him who takes such security to ascertain whether the trustee has a right to give it. The appropriation of corporate stock held in trust, as collateral security, for the trustee's own debt, or a debt which he owes jointly with others, is a transaction so far beyond the ordinary scope of a trustee's authority and out of the common course of business as to be in itself a suspicious circumstance, imposing upon the creditor the duty of inquiry. This would hardly be controverted in a case where the stock was held by 'A. B., trustee for C. D.' But the effect of the word 'trustee' alone is the same. It means trustee for some one whose name is not disclosed; and there is no greater reason for assuming that a trustee is authorized to pledge for his own debt the property of an unnamed *cestui que trust*, than the property of one whose name is known. In either case it is highly improbable that the right to do so exists. The apparent difference between the two springs from the erroneous assumption that the word 'trustee' alone has no meaning or legal effect.

"Inasmuch as such an act of pledging property is *prima facie* unlawful, there would be little hardship in imposing on the party who takes the security, not only the duty of inquiry, but the burden of ascertaining the actual facts, at his peril. Where a partner assumes to give, for his own private debt, the note of his firm, the creditor who takes it must show that it was given with the assent of the other partners; because it is an apparent misuse of the name of the firm and *prima facie* evidence of fraud. *Eastman v. Cooper*, 15 Pick. 290. But we need not go to that length in deciding the present case. Notice of the existence of a trust is by all the authorities held to impose the duty of inquiry as to its character and limitations. And whatever is sufficient to put a person of ordinary



the latter can claim no rights under the transaction as against the *cestuis*.<sup>1</sup> Of course, if there are no indications of fraud,

prudence upon inquiry, is constructive notice of everything to which that inquiry might have led. The objection that in the present case the only persons of whom inquiry could have been made were Mellen and Carter, who committed the breach of trust, is sufficiently answered by the words of Sir John Romilly, Master of the Rolls, in a recent and leading case: 'With respect to the argument that it was unnecessary to make any inquiry, because it must have led to no results,' he says, 'I think it impossible to admit the validity of this excuse. I concur in the doctrine of *Jones v. Smith*, 1 Hare, 55, that a false answer, or a reasonable answer, given to an inquiry made, may dispense with the necessity of further inquiry; but I think it impossible beforehand to come to the conclusion, that a false answer would have been given, which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry; namely, a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say.' *Jones v. Williams*, 24 Beav. 62. These remarks also explain the cases, cited by the defendants, of *Buttrick v. Holden*, 13 Met. 355, and *Calais Steamboat Co. v. Van Pelt*, 2 Black, 377. In each of these cases the party did make inquiry, and relied upon the answers received, which were of a character calculated to put him off his guard.

"The case of *Ashton v. Atlantic Bank*, 3 Allen, 217, is not in conflict with these views. It does not proceed on the ground that there was no duty to inquire, but that upon inquiry and examination of the will creating the trust it would have appeared that the trustee might have the right to use the trust funds as he did. He raised money upon the stocks by a discount of his own note with them as collateral; and the court said that it might have been incident to his duties 'to discount the trust funds for the sake of making a permanent investment,' or 'the purchaser might reasonably assume that the money was wanted to discharge a liability incurred under the will. Such a case was well warranted by the will creating the trust.' In short, the court came to the conclusion that the act of the trustee was in itself lawful in that particular case, and that his fraud consisted only in the misuse of the money when obtained. If this was true, of course the purchaser was not bound to see to the application of the purchase-money.

"*Hutchins v. State Bank*, 12 Met. 421, was the case of a sale of shares of bank stock by an executrix. It is the established rule of equity that 'purchases from executors of the personal property of their testator are

<sup>1</sup> *Milhous v. Dunham*, 78 Ala. 48.

and no circumstances that lead to a suspicion that the purchaser is dealing with trust property, he is put upon no in-

ordinarily valid, notwithstanding it may be affected with some peculiar trust or equity in the hands of the executor; for the purchaser cannot be presumed to know that the sale may not be required in order to discharge the debts of the testator, to which they are legally liable before all other claims. But if the purchaser knows that the executor is converting the estate into money for an unlawful purpose, the purchase will be set aside.' Smith on Eq., tit. 1, c. iv. 10. 'Where an executor disposes of or pledges his testator's assets, in payment of, or as security for, a debt of his own, the person to whom they are disposed of or pledged will take them subject to the claims of creditors and legatees.' *Elliott v. Merryman*, 1 Lead. Cas. in Eq. 89; *Hill v. Simpson*, 7 Ves. 152. The same doctrine was held by Chancellor Kent, in 1823, in *Field v. Schieffelin*, 7 Johns. Ch. 150, who upon a review of all the cases down to the time of that decision, thus sums up the result: 'The great difficulty has been to determine how far the purchaser dealt at his peril, when he knew, from the very face of the proceeding, that the executor was applying the assets to his own private purposes, as the payment of his own debt. The later and the better doctrine is, that in such a case he does buy at his peril.' Chief Justice Gibson, in *Petrie v. Clark*, 11 S. & R. 377, expressly announces the doctrine, 'that an executor's applying the assets in payment of his own debt is of itself a circumstance of suspicion, which ought to put the purchasing creditor upon inquiry as to the propriety of the transaction.'

"The rule was thus laid down, in 1861, in the House of Lords: 'Where an executor parts with any portion of the assets of the testator, under such circumstances as that the purchaser must be reasonably taken to know that they were sold, not for the benefit of the estate, but for the executor's own profit, the result is, that the purchaser holds the assets as if he were himself, in respect of those assets, the executor.' *Walker v. Taylor*, 21 Law Times (N. S.), 845. See also 2 Redfield on Wills, c. viii. § 32.

"The power of disposition over a testator's assets which an executor has, is as extensive as that of a trustee, and the conversion of the testator's personal estate into money is within the ordinary line of an executor's duty. Consequently the authorities which have been cited as to the liability of those dealing with executors are fully applicable to the case of one who takes trust property from a trustee as security for his private indebtedness.

"The fact that it is usual for dealers in stock to take certificates with blank transfers upon them, and to fill them up with the names of purchasers, was wholly immaterial. Such a practice, as we have already observed, does not make the shares negotiable, and the purchaser whose

quiry.<sup>1</sup> The same rules apply to all persons holding fiduciary relations to others, or holding property for the use and

name is written into the transfer must always derive his title immediately and solely from the stockholder of record. The point is not made by the plaintiff, that a transfer in blank is out of the usual course of business, or a suspicious circumstance; so that evidence of usage was not requisite to repel such an inference.

“The fact that it is common to issue certificates of stock in the name of one as trustee, when no trust actually exists, has no legal bearing on the decision of the present case. The rules of law are presumed to be known by all men; and they must govern themselves accordingly. The law holds that the insertion of the word ‘trustee’ after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice, and to abstain from inquiry for the reason that a trust is frequently simulated or pretended when it really does not exist. The whole force of this offer of evidence is addressed to the question whether the word ‘trustee’ alone has any significance, and does not amount to notice of the existence of a trust. But this has been heretofore decided, and is no longer an open question in this Commonwealth. *Sturtevant v. Jaques*, 14 Allen, 523.

“The circumstance that stock certificates, issued in the name of one as trustee, and by him transferred in blank, are constantly bought and sold in the market without inquiry, is likewise unavailing. A usage to disregard one’s legal duty, to be ignorant of a rule of law, and to act as if it did not exist, can have no standing in the courts.

“It is to be borne in mind that the question under discussion is not whether one holding as trustee may sell it in the market, and pass a good title to the purchaser. We do not intimate that this cannot be done. The distinction between a sale and a pledge of trust property is palpable and manifest. Nor is the present question whether a trustee may borrow money on the pledge of stock held in trust. We do not decide that such a transaction may not, under some circumstances, be sustained. These questions are left to be adjudged when they arise. The point now decided is, that one holding stock as trustee has *prima facie* no right to pledge it to secure his own debt growing out of an independent transaction; and that whoever takes it as security for such a debt, without inquiry, does so at his peril. All the proffers of evidence, taken together, fall short of showing any usage to do this; and no evidence of usage could legalize such conduct. Because *Spencer, Vila, & Co.* took these certificates of stock to secure an antecedent debt from *Mellen, Ward, & Co.* to them, with notice that they were held in trust, and made no inquiry as to *Carter’s* authority to use trust property for such a purpose, they cannot retain

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<sup>1</sup> *Leach v. Ausbacher*, 55 Penn. St. 85.

benefit of others; thus creditors of a partnership cannot receive partnership assets in payment of the private debts of one of the partners.<sup>1</sup>

§ 815. Wherever in the preceding cases there is fraud or suspicion of fraud, the transaction may be investigated and impeached by creditors,<sup>2</sup> or by specific,<sup>3</sup> residuary,<sup>4</sup> and pecuniary legatees, if they are injured in their rights. But the court will not reopen transactions that have been allowed to sleep for twenty years or more.<sup>5</sup>

§ 815 a. As a rule creditors or persons who have rendered service to the *cestui* may reach the beneficial interest by proceedings in equity.<sup>6</sup> Equity will apply the income of a life

the security against the equitable owner of the stock, when it appears that Carter in making the pledge was guilty of a fraudulent breach of trust."

In *Jaudon v. National City Bank*, 8 Blatch. 431, it appeared that a trustee borrowed money for his own private purposes, and pledged stock, which the lender knew that he held in trust as collateral. The *cestui que trust* afterwards called upon the lender for the stock. The court held that he was entitled to reclaim it, as the lender of the money knew that the trustee was borrowing the money for his own private purposes, and that the sale of the stock was not made in the regular course of business. And the court cited *McLeod v. Drummond*, 17 Ves. 152; *Field v. Schiefelin*, 7 Johns. Ch. 150; *Lowry v. Commercial and Farmers' Bank*, Taney, 310; *Pendleton v. Fay*, 2 Paige, 202; *Bayard v. Farmers' and Mechanics' Bank*, 52 Penn. St. 222; *Baker v. Bliss*, 39 N. Y. 70, 76; *Carr v. Hilton*, 1 Curtis C. C. 390; and the above case of *Shaw v. Spencer*. The cause was carried to the Supreme Court at Washington, where the decision of the court was affirmed. *Duncan v. Jaudon*, 15 Wall. 115.

<sup>1</sup> *Hoxie v. Carr*, 1 Sumn. 193; *Tillinghast v. Champlin*, 4 R. I. 173, 213; *Pipkin v. Casey*, 13 Mo. 347; *Dyer v. Clark*, 5 Met. 580; *Topley v. Butterfield*, 1 Met. 515; *Hertell v. Bogert*, 9 Paige, 59; *Polk v. Robinson*, 7 Ir. Eq. 231; *Bond v. Zeigler*, 1 Kelly, 324.

<sup>2</sup> *Crane v. Drake*, 2 Vern. 616; *Mead v. Orrery*, 3 Atk. 238; *Nugent v. Gifford*, 1 Atk. 463; *Anon.*, cited Pr. Ch. 434.

<sup>3</sup> *Scott v. Tyler*, 2 Dick. 712; *Humble v. Bill*, 2 Vern. 444.

<sup>4</sup> *McLeod v. Drummond*, 17 Ves. 161; *Mead v. Orrery*, 3 Atk. 235; *Burting v. Stonard*, 2 P. Wms. 150.

<sup>5</sup> *Hill v. Simpson*, 7 Ves. 152; *McLeod v. Drummond*, 17 Ves. 169.

<sup>6</sup> *Forbes v. Lothrop*, 137 Mass. 523, — a case under the Pub. Stats.

trust to debts of the life *cestui*. Those who live on capital clothed with a trust must be content to consume the net income; they cannot have the gross receipts and leave honest debtors unpaid.<sup>1</sup> In the absence of special circumstances the creditors of the *cestui* can attach the beneficial interest in the hands of the trustee, as rents, profits, etc., payable to the *cestui*.<sup>2</sup> Where one creates a trust, retaining the beneficial interest in himself, he cannot prevent his creditors from coming at the income by a provision against anticipation.<sup>3</sup> Nor will a conveyance on secret trust for the grantor be good against creditors, prior or subsequent.<sup>4</sup> But where the *cestui* is not the donor or creator of the trust, and there are provisions against anticipation or making the application of the income discretionary with the trustee, the creditors cannot reach it.<sup>5</sup> When the trust is not enforceable by the *cestui* his creditors cannot reach it. A remote, uncertain, contingent, beneficial interest cannot be reached.<sup>6</sup> A gift to A. with the request to support B. does not create any interest in B. that can be reached by his creditors. "There is no provision for the payment of any money to him at all."<sup>7</sup> Where a gift of land was made to trustees to keep in repair, rent, collect profits, etc., and pay all incomes to the grantor's daughter "*in person*, and not upon any written or verbal order, nor upon any assignment or transfer by" the daughter, it was held that the intention was to place the net income

see § 827 *a*. *Munden v. Bailey*, 70 Ala. 63; *Tolles v. Wood*, 99 N. Y. 616, the surplus of income above what is needed for the support of the *cestui* can be reached. The plaintiff must prove that there is a surplus, the habits and ability of the *cestui* being considered in deciding what is to be allowed for his maintenance. *Kilroy v. Wood*, 42 Hun, 636.

<sup>1</sup> *Hatcher v. Massey*, 71 Ga. 797; *Kupferman v. McGhee*, 63 Ga. 257; *Wingfield v. Rhea*, 73 Ga. 477. As to the allegations, see *Greenfield v. Vason*, 74 Ga. 126.

<sup>2</sup> *Knefler v. Shreve*, 78 Ky. 297.

<sup>3</sup> *Pacific Nat'l Bk. v. Windram*, 133 Mass. 175.

<sup>4</sup> *Winsmith v. Winsmith*, 15 S. C. 611.

<sup>5</sup> *Davidson's Ex'r v. Kemper*, 79 Ky. 5; *Foster v. Foster*, 133 Mass. 180; *Spindle v. Shreve*, 9 Biss. 199. See §§ 387, 670, 671, 827 *a*.

<sup>6</sup> *Russell v. Milton*, 133 Mass. 181, 182.

<sup>7</sup> *Baker v. Brown*, 146 Mass. 369, 372.

beyond the control of the daughter or her creditors so long as it remained in the hands of the trustee, and that the court would enforce this intention; wherefore the trustee could not be garnished.<sup>1</sup> And where a will left property to A. for the use of B., and provided that no part of the property should be sold by B. or be liable to process on account of his debts, it was held that such a provision was not against public policy and was valid.<sup>2</sup> An execution only operates on an estate in which the legal title is coupled with the beneficial interest, or in which the legal and equitable titles are merged by law in the same person, or so combine in him that he has a right to call for an immediate conveyance of the legal estate; but there can be no merger or call, where the legal and equitable estates are not commensurate, or where their union would be contrary to the intent of the grantor.<sup>3</sup> In Alabama, however, the judges used very strong language, "No one can have a legal or equitable right to property, which is not subject to the payment of his debts" at law or in equity.<sup>4</sup> "Whatever a debtor can himself claim to enjoy as a general use, benefit, or interest, in property capable of separation and division, may be reached by his creditors."<sup>5</sup> "Ingenuity cannot devise a plan by which one can have the use and benefit of property (with the exception of a joint use incapable of severance) in defiance of his creditors. Whether it is in the shape of a maintenance in the discretion of trustees, or is openly avowed to be for his use and benefit, in every conceivable case it can be reached."<sup>6</sup> But an absolute power in the trustee to withhold entirely, or to apply, will probably place the funds beyond reach of *cestui*, creditor, or court,<sup>7</sup> except where the conduct of the trustee is an abuse of the discretion reposed in him, under the principles of §§ 510,

<sup>1</sup> Steib v. Whitehead, 111 Ill. 247.

<sup>2</sup> Jourolmon v. Massengill, 86 Tenn. 82, 83.

<sup>3</sup> Henderson v. Hill, 9 Lea (Tenn.), 25.

<sup>4</sup> Rugely v. Robinson, 10 Ala. 731.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid. ; and see Robertson v. Johnson, 36 Ala. 197 ; Smith v. Moore, 37 Ala. 329.

<sup>7</sup> Taylor v. Harwell, 65 Ala. 14.

511. A trustee who has prior to service of garnishment brought the fund into court is not subject to the garnishment; the creditors must intervene in that court, setting up their claim.<sup>1</sup>

§ 815 b. If goods are supplied to a trustee, by one ignorant of the trust, and the goods benefit the trust property, the vendor may recover of the trust estate in case the trustee becomes insolvent.<sup>2</sup> Where a trustee, with consent of the *cestui*, takes a loan to improve the trust estate, and does so improve it, the lender can hold the estate even though the order of court authorizing the mortgage may be invalid.<sup>3</sup> But if a trustee, without being authorized, makes a contract, even though it is beneficial to the estate, the person with whom he contracts cannot charge the estate unless the trustee is insolvent and the estate is in debt to him;<sup>4</sup> and this is so although the contract was made in performance of the trust.<sup>5</sup> The bill should show the existence of the trust, the power of the trustee to bind the trust estate, and the specific facts rendering it liable.<sup>6</sup> A creditor seeking to set aside the trust-deed as a fraud on him, may proceed against the trustee without joining the *cestui*.<sup>7</sup> One who sells goods to a trustee on his individual credit may afterwards become a creditor of the trust estate, if the goods are adapted to trust use, are actually so used, and the trustee as such gives a note for the balance due on them.<sup>8</sup> The private creditors of the trustee have no claim on trust property where the trust has been created by, or the fund has proceeded from some person other than the debtor,<sup>9</sup> and their attachment of it will not hold, though the title stands in the name of the trustee as an indi-

<sup>1</sup> *State v. Netherton*, 26 Mo. App. 414.

<sup>2</sup> *Moore, &c. v. Lampkin*, 63 Ga. 748.

<sup>3</sup> *Harvey v. Cubbedge*, 75 Ga. 794.

<sup>4</sup> *Blackshear v. Burke*, 74 Ala. 239.

<sup>5</sup> *Mosely & Eley v. Norman*, id. 422.

<sup>6</sup> *Jackson v. Pool*, 73 Ga. 801. See *Brightwell v. Jordan*, 74 Ga. 486.

<sup>7</sup> *Tucker v. Zimmerman*, 61 Ga. 599.

<sup>8</sup> *Kupferman v. McGhee*, 63 Ga. 250.

<sup>9</sup> *Lippincott v. Evens*, 35 N. J. Eq. 553.

vidual, and the creditor has no notice of the trust;<sup>1</sup> and where a debtor receives the title to property for the specific purpose of conveying it to another, his creditors cannot complain on account of his executing the trust, whether so constituted as to be legally binding or not.<sup>2</sup> But if one purchases lands partly with trust funds and partly with his own funds or credit, he has an interest in the property which can be reached by his creditors.<sup>3</sup> In Minnesota, a creditor after exhausting his remedies at law may bring an action to enforce a statutory trust in favor of creditors, where the judgment debtor has paid the consideration for land the legal title to which has been granted to another.<sup>4</sup> Where a general guardian placed his ward at plaintiff's school, it was held that an action would lie against the guardian, the infant, and the trustee, to compel the latter to apply funds belonging to the infant to the plaintiff's claim.<sup>5</sup> One who, with the knowledge and approval of the court, and the acquiescence of all parties, makes improvements on trust property, may perfect a lien upon it.<sup>6</sup> An attorney retained by the trustee to protect the estate from illegal claims may recover for his services from the estate.<sup>7</sup>

§ 815 c. No parol or resulting or other trust affects *bona fide* purchasers or takers for value without notice.<sup>8</sup> Nor will a breach of trust affect an innocent purchaser.<sup>9</sup> Knowl-

<sup>1</sup> Houghton v. Davenport, 74 Maine, 590. But the recording statutes of the State may make exceptions.

<sup>2</sup> First Nat'l Bank of Lewiston v. Dwelley, 72 Maine, 223; Wherry v. Hale, 77 Mo. 20.

<sup>3</sup> Martin v. Baldwin, 30 Minn. 537.

<sup>4</sup> Moffatt v. Tuttle, 35 Minn. 301; Wadsworth v. Schisselbauer. 32 Minn. 84.

<sup>5</sup> Bulkley v. Staats, 31 Hun, 137.

<sup>6</sup> Carey v. Kemper, 40 Ohio St. 79.

<sup>7</sup> Manderson's App., 113 Penn. St. 631.

<sup>8</sup> McCaskill v. Lathrop & Co., 63 Ga. 96; Roberts v. Robinson, id. 666; Johnson v. Sirmans, 69 Ga. 617; Erwin v. Hall, 18 Brad. (Ill.) 345; Branch v. Griffin, 99 N. C. 173; Bailey v. Colton, 25 St. 436; McKamey v. Thorp, 61 Tex. 648; Conover v. Beckett, 38 N. J. Eq. 384.

<sup>9</sup> Carey v. Brown, 62 Cal. 373.



edge that the vendor had mingled the trust funds with his own will not be sufficient to charge the vendee if he did not know that any trust funds went into the property he bought, and he has a right to rely on the vendor's assurances on that point if he acts prudently.<sup>1</sup> To charge a stranger to the trust as a trustee, by reason of participation in a misapplication of the fund, it is necessary to show that such person was aware of the character of the fund, and that the purpose to which it was applied was not a proper one for its use.<sup>2</sup> Whoever receives property, knowing that it is transferred to him in violation of a trust, takes it subject to the right not only of the *cestui*, but also of the trustee, to reclaim possession.<sup>3</sup> Judgment creditors and purchasers are protected by the provisions of the Code in Alabama.<sup>4</sup> A purchaser under an order of the chancellor having jurisdiction stands on the same footing as one without notice of the trust.<sup>5</sup>

<sup>1</sup> Hathorn v. Maynard, 65 Ga. 168.

<sup>2</sup> Fifth Nat'l Bank v. Hyde Park, 101 Ill. 595.

<sup>3</sup> Zimmerman v. Kinkle, 108 N. Y. 282; Wetmore v. Porter, 92 N. Y. 76.

<sup>4</sup> § 2200; Carter Bros. v. Challen, 83 Ala. 135; Dickerson v. Carroll, 76 Ala. 377.

<sup>5</sup> Iverson v. Saulsbury, 65 Ga. 724.

## CHAPTER XXVII.

RIGHTS AND REMEDIES OF THE CESTUIS QUE TRUST IN RELATION  
TO THE TRUST PROPERTY.

- § 816. Right of *cestuis que trust* to an injunction.
- § 816 *a.* Right to a conveyance.
- § 816 *b.* Right to force a discretionary trustee to act, see § 510.
- § 817. Right to the removal of the trustees.
- § 818. Where a receiver may be appointed.
- § 819. Where a receiver will not be appointed.
- § 820. Where a receiver will be discharged.
- § 820 *a.* A sale may be decreed.
- § 821. Trustees must furnish clear accounts to the *cestuis que trust*.
- §§ 822, 823. *Cestuis que trust* have the right to the production of books of accounts and documents.
- § 824. The fund may be paid into court upon suit of *cestuis que trust*.
- § 825. Within what time it must be paid in.
- § 826. Upon what state of facts it will be ordered to be paid in.
- § 827. A case for payment into court must be clearly stated in plaintiff's bill, and not denied in the answer.
- § 827 *a.* Right of *cestui* to alienate his estate or charge his income by anticipation.
- § 827 *b.* Rights of *cestui's* administrator.
- Following trust property.
- § 828. *Cestuis que trust* may follow the trust fund into the hands of third persons.
- §§ 829, 830. When a purchaser is protected and when not.
- § 831. *Choses in action* may be followed.
- § 832. Where a borrower of the trust fund has notice.
- §§ 833, 834. Notice of doubtful equities.
- §§ 835, 836. *Cestuis que trust* may follow the trust fund into other property in the hands of the trustees, or of third persons.
- §§ 837, 838. Where trust property is mixed with a trustee's own property.
- § 839. Parol evidence admissible to trace and identify the fund.
- § 840. Statute of limitations does not apply.
- § 841. Evidence of the identity of the fund.
- § 842. Lien in case the trust fund is a part only of an estate.
- Remedies against trustee.
- § 843. Personal liability of the trustee for a breach of trust and the remedy.
- § 844. *Cestuis que trust* may compel trustee to replace the property.
- § 845. Trustee must make up all losses from his neglect.
- § 846. Third persons who benefit by or advise a breach of trust may be made responsible.

- § 847. Not material that trustees have not benefited by a breach of the trust.  
Destruction of remedy against trustee by acquiescence, waiver, or release.
- § 848. Liability of cotrustees and *cestuis que trust* concurring in a breach of trust.
- § 849. *Cestuis que trust* concurring in breach of trust are estopped.
- § 850. *Cestuis que trust* can have no relief if they acquiesce in a breach of trust.
- § 851. *Cestuis que trust* may release or waive a breach of trust. Conditions of a valid release.
- § 852. Other ways in which a breach of trust may be discharged.
- § 853. Parties interested alone can release a breach of trust.

§ 816. THE *cestui que trust* may compel the trustee to the observance and performance of his duty; and if there is reason to suppose, or the court is satisfied, that the trustee is about to proceed in an unauthorized manner, an injunction will be granted to restrain the improper exercise of the legal power in the trustee,<sup>1</sup> and such other orders may be made as will best secure the proper administration of the trusts.<sup>2</sup> It is well established, that the *cestui que trust* is entitled to an injunction, where the intended act, if done by the trustee, will be irremediable;<sup>3</sup> and so any person interested in the estate in common with others may, in behalf of himself and the others, procure proper orders for the security of the property.<sup>4</sup> A person whose interest is a contingent remainder may have a bill against the trustee, tenant for life, for the protection of the estate.<sup>5</sup> So a mortgagor in a power-of-sale mortgage, or other person interested in the equity of redemption, may procure an injunction restraining a sale by the mortgagee after a tender to him of the principal and interest

<sup>1</sup> *Balls v. Strutt*, 1 Hare, 146; *Corporation of Ludlow v. Greenhouse*, 1 Bl. N. R. 57; *In re Chertsey Market*, 6 Price, 279, 281; *Att. Gen. v. Foundling Hosp.*, 2 Ves. Jr. 42.

<sup>2</sup> *Toppan v. Ricomio*, 1 Green, Ch. 89.

<sup>3</sup> *Anon.*, 6 Madd. 10; *Webb v. Shaftesbury*, 7 Ves. 487; *Reeve v. Parkins*, J. & W. 390; *Milligan v. Mitchel*, 1 M. & K. 446; *Att. Gen. v. Liverpool*, 1 M. & C. 210; *Vann v. Barnett*, 2 Bro. Ch. 157; *Davis v. Browne*, 2 Del. Ch. 188. The contrary opinion, expressed in *Pechel v. Fowler*, 2 Anst. 549, has not been followed.

<sup>4</sup> *Scott v. Becher*, 4 Price, 346.

<sup>5</sup> *Clarke v. Devereaux*, 1 S. C. 172.

due; and a purchaser with notice is not protected, although there is a clause exempting him from seeing to the validity of the sale.<sup>1</sup> A purchaser with notice of the trust from a trustee would be subject to the same liabilities as the trustee. An injunction may be had against the disposition of the fund by an insolvent trustee,<sup>2</sup> or against a bankrupt trustee;<sup>3</sup> but if the trustee or executor is merely poor, the court will not interfere.<sup>4</sup> An injunction has been granted against the administration of a trust by an executor of bad character, drunken habits, and great poverty.<sup>5</sup> Stockholders in banks or other corporations may have injunctions against the directors of the corporation, to prevent breaches of the trust.<sup>6</sup> But the inhabitants of a town or city cannot have an injunction against the town or its officers, in the absence of an enabling statute.

§ 816 a. The equitable owner is entitled to a conveyance from the one holding the legal title or the *prima facie* legal title,<sup>7</sup> but he cannot compel a conveyance of the property before the prior purposes named in the trust are accomplished, at least without showing maladministration by the trustee.<sup>8</sup> (a) But a *cestui* is entitled to a conveyance of land bought by the trustee with trust funds and conveyed to another having knowledge of the trust,<sup>9</sup> or of trust property bought in by the trustee.<sup>10</sup> A trustee cannot assert title in

<sup>1</sup> Jenkins v. Jones, 2 Gif. 99.

<sup>2</sup> Mansfield v. Shaw, 3 Madd. 100; Taylor v. Allen, 2 Atk. 213; Scott v. Becher, 4 Price, 346.

<sup>3</sup> Gladdon v. Stoneman, 1 Madd. 143, n.

<sup>4</sup> Howard v. Papera, 1 Madd. 143; Hathornthwaite v. Russell, 2 Atk. 126; Barn. 334.

<sup>5</sup> Everett v. Prythergch, 12 Sim. 365.

<sup>6</sup> Ante, § 207; Dodge v. Woolsey, 18 How. 331; Mechanics' Bank v. De Bolt, id. 330; McDowell v. Brantley, 80 Ala. 173.

<sup>7</sup> Winona & St. Paul R. Co. v. St. Paul & S. C. R. Co., 26 Minn. 181.

<sup>8</sup> Seamans v. Gibbs, 132 Mass. 239.

<sup>9</sup> Cobb v. Knight, 74 Maine, 253.

<sup>10</sup> Dodge v. Stevens, 94 N. Y. 209.

(a) See *In re Lashmar*, [1891] 1 Ch. 258.

himself or deny the right of the *cestui* in a suit for conveyance, on the ground of an outstanding superior title.<sup>1</sup>

§ 816 *b*. If a trustee, having discretion as to the time and amount of payments to be made to the *cestui* or for her benefit, refuses to make any payment at all, he commits a breach of trust against which the courts will give relief.<sup>2</sup>

§ 817. The *cestuis que trust* may bring a bill or petition for removal, and the court may remove the trustees from office, and appoint others in their place, when there has been bad conduct, or the trustee is unfit for his office, or to prevent a threatened breach of trust or any danger to the trust fund;<sup>3</sup> but if the conduct of the trustee proceeds from a misunderstanding of his duty, or from mistake, or a long-continued practice by himself and other trustees, and not from any dishonest, selfish, or improper motives, and the safety of the property is not imperilled, the court generally will not remove him.<sup>4</sup>

§ 818. Proceedings for the removal of trustees and the appointment of others require some little time, as trustees have the right to file answers to the charges against them, and to a regular and full hearing; and as the *cestuis que trust* are entitled to have the fund properly protected and managed in the mean time, the court may appoint receivers.<sup>5</sup> Thus, if it can be shown that the trustees have been guilty of misconduct, waste, or an improper disposition of the estate;<sup>6</sup> or

<sup>1</sup> *Neyland v. Bendy*, 69 Tex. 711.

<sup>2</sup> *Collins v. Severson*, 2 Del. Ch. 324.

<sup>3</sup> *Ante*, § 275, and cases cited; *Parsons v. Winslow*, 6 Mass. 169; *Dixon v. Smith*, 2 Rich. Eq. 131; *Johnson's App.*, 9 Penn. St. 416; *Losley v. Losley*, 1 Duv. 117.

<sup>4</sup> *Ante*, § 276, and cases cited; 2 Story, Eq. Jur. § 1289.

<sup>5</sup> *Beverley v. Brooke*, 4 Grat. 208; *Calhoun v. King*, 5 Ala. 523; *Jones v. Dougherty*, 10 Ga. 273; *Edie v. Applegate*, 14 Iowa, 273.

<sup>6</sup> *Anon.*, 12 Ves. 5; *Middleton v. Dodswell*, 13 Ves. 266; *Howard v. Papera*, 1 Madd. 142; *Richards v. Perkins*, 3 Y. & Col. 299; *Evans v. Coventry*, 5 De G., M. & G. 911; *Att. Gen. v. Bowyer*, 3 Ves. 714.

that they have an undue leaning towards one of two conflicting interests;<sup>1</sup> or that the fund is in danger from their insolvency or bankruptcy;<sup>2</sup> or that one of the trustees has been guilty of misconduct, and the other trustees desire a receiver;<sup>3</sup> or that they are incapacitated from acting;<sup>4</sup> or that they are of bad character, drunken habits, and great poverty;<sup>5</sup> or that the trustees are out of the jurisdiction;<sup>6</sup> or that they so disagree among themselves that the estate cannot be properly administered,<sup>7</sup>—receivers will be appointed; and so where the trustee was a married woman, and her husband was out of the jurisdiction.<sup>8</sup> In all cases, the court will appoint a receiver if the trustees and *cestuis que trust* agree or concur in the appointment.<sup>9</sup> But the court will require security.<sup>10</sup>

§ 819. The court will not appoint a receiver, and take the administration of the trust out of the hands of the trustees upon slight grounds.<sup>11</sup> It is not a sufficient ground of itself for a receiver, that one trustee has disclaimed, another is inactive, and another has gone abroad, if there is still a trustee capable and willing to execute the trust;<sup>12</sup> nor that

<sup>1</sup> Talbot v. Scott, 4 K. & J. 139.

<sup>2</sup> Scott v. Becher, 4 Price, 346; Gladdon v. Stoneman, 1 Madd. 143, n.; Langley v. Hawk, 5 Madd. 46; Mansfield v. Shaw, 3 Madd. 100; Havers v. Havers, Barn. 23; Middleton v. Dodswell, 13 Ves. 266; Anon., 12 Ves. 4; Steele v. Cobham, L. R. 1 Ch. 325.

<sup>3</sup> Middleton v. Dodswell, 13 Ves. 266; Tidd v. Lister, 5 Madd. 429.

<sup>4</sup> Bainbrigge v. Blair, 3 Beav. 481.

<sup>5</sup> Everett v. Prythergch, 12 Sim. 367.

<sup>6</sup> Noad v. Backhouse, 2 Y. & Col. Ch. 529; Smith v. Smith, 10 Hare, App. 71; Tidd v. Lister, 5 Madd. 429.

<sup>7</sup> Day v. Croft, Lewin on Trusts, 731; Swale v. Swale, 22 Beav. 584.

<sup>8</sup> Taylor v. Allen, 2 Atk. 213.

<sup>9</sup> Brodie v. Barry, 3 Mer. 695, and case cited; Browell v. Reid, 1 Hare, 435.

<sup>10</sup> Manners v. Furze, 11 Beav. 30; Tylee v. Tylee, 17 Beav. 583.

<sup>11</sup> Barkley v. Reay, 2 Hare, 306; Middleton v. Dodswell, 13 Ves. 268; Ogden v. Kip, 6 Johns. Ch. 160.

<sup>12</sup> Browell v. Reid, 1 Hare, 434; Tait v. Jenkins, 1 Y. & Col. Ch. 492.

the trustees are poor, if they are not insolvent;<sup>1</sup> nor that trustees for sale have let the purchaser into possession before the purchase-money is paid.<sup>2</sup> There must be good reason to fear that the property will not be forthcoming at the end of the litigation, or the court will not appoint a receiver.<sup>3</sup>

§ 820. A receiver is appointed for the benefit of all parties interested, and therefore he will not be discharged upon the application of one party, although he is the party that applied for the appointment.<sup>4</sup> But the expenses of the receivership, together with the commissions of the receivers, must be paid out of the income of the tenant for life.<sup>5</sup> (a) For this reason the court will appoint new trustees and discharge the receiver as soon as it can be done in the regular progress of the suit, to relieve the tenant for life from all extraordinary or unnecessary burdens.<sup>6</sup>

§ 820 *a*. Courts in equity also have jurisdiction to decree a sale of the trust property, if the trust fund can thereby be administered more beneficially, and in accordance with the intention of the donor.<sup>7</sup> (b) For example, if the particular property should become unavailable for the purposes of the trust.<sup>8</sup> And the birth of a child, who may have an interest in the trust, will not invalidate a previous order of sale.<sup>9</sup>

<sup>1</sup> *Anon.*, 12 Ves. 4; *Howard v. Papera*, 6 Madd. 142; *Hathornthwaite v. Russell*, 2 Atk. 126; *Havers v. Havers*, Barn. 23.

<sup>2</sup> *Browell v. Reid*, 1 Hare, 434.

<sup>3</sup> *Poythress v. Poythress*, 16 Ga. 406; *Ogden v. Kip*, 6 Johns. Ch. 160.

<sup>4</sup> *Bainbrigge v. Blair*, 3 Beav. 423.

<sup>5</sup> *Shore v. Shore*, 4 Drew. 510.

<sup>6</sup> *Bainbrigge v. Blair*, 3 Beav. 421; *Poole v. Franks*, 1 Moll. 80.

<sup>7</sup> *Aleman v. Wensinger*, 40 Cal. 288; *Overby v. Hart*, 68 Ga. 493; *Iverson v. Saulsbury*, 68 Ga. 790.

<sup>8</sup> *Ryan v. Porter*, 61 Tex. 106.

<sup>9</sup> *Ansley v. Pace*, 68 Ga. 403.

(a) A trustee will not usually be appointed receiver except on the terms of his receiving no remuneration; but the rule is not inflexible. *In re Bignell*, [1892] 1 Ch. 59.

(b) The court may even change the terms of a trust, in order to effectuate the donor's intention, or in cases of real necessity. *Johns v. Johns*, 172 Ill. 472.

In Georgia it has been decided that the chancellor may on notice to all parties allow a trustee to sell in term time or at chambers, yet an order to *mortgage* cannot be given unless in term time.<sup>1</sup> (a) But on the last point the later cases hold that on a petition by all the parties the chancellor in chambers may authorize a mortgage.<sup>2</sup> The trust estate will be held for money loaned to improve the estate with consent of the *cestui*, even if the order of court authorizing a mortgage should prove invalid.<sup>3</sup> If the court has jurisdiction the sale extinguishes the trust quality in the property sold, and transfers it to the fund received for the property.<sup>4</sup> (b) Where a power of sale has been given to a trustee in his discretion, the court cannot force him to act, nor after his death can a trustee appointed by it exercise the power.<sup>5</sup> A sale of a trust for lives with contingent remainder under order of the chancellor and with consent of those holding vested interests is good; the contingent remainder-men are not necessary parties.<sup>6</sup>

§ 821. A trustee or executor is bound to keep clear, distinct, and accurate accounts.<sup>7</sup> If he does not, all presumptions are against him, and all obscurities and doubts are to be taken adversely to him.<sup>8</sup> If he enters these accounts in his private books, he is bound to produce the books, although such books contain his private accounts;<sup>9</sup> and even if he

<sup>1</sup> Iverson v. Saulsbury, 68 Ga. 790.

<sup>2</sup> Weems v. Coker, 70 Ga. 746; Weems v. Harrold, 75 id. 866.

<sup>3</sup> Harvey v. Cubbedge, 75 Ga. 795.

<sup>4</sup> Cowman v. Colquhoun, 60 Md. 127.

<sup>5</sup> Young v. Young, 97 N. C. 132.

<sup>6</sup> Schley v. Brown, 70 Ga. 64.

<sup>7</sup> Gaston's Trust, 35 N. J. Eq. 60; if he loses his accounts he must bear any resulting damage.

<sup>8</sup> Blauvelt v. Ackerman, 23 N. J. Eq. 493.

<sup>9</sup> Freeman v. Fairlee, 3 Mer. 43; Hopkinson v. Burghly, L. R. 2 Ch.

(a) The cited case has since been disapproved, the rule in Georgia now being that a judge may at chambers grant leave to a trustee to mortgage trust property. Weems v. Coker, 70 Ga. 746; Wagnon v. Pease (Ga.), 30 S. E. 900.

(b) McCann v. Randall, 147 Mass. 81, 87.



enters the accounts of the trust in the books of the firm of which he is a partner, the books must be produced.<sup>1</sup> The *cestuis que trust* may enforce these rights against all persons acting for, or claiming by, through, or under the trustee with notice, or taking without value.<sup>2</sup> But where an agent was employed to manage an estate, and he entered the accounts in the same books in which he kept the accounts of other estates which he managed for other persons, the court declined to order the production of the books in the absence of such persons.<sup>3</sup>

§ 822. Where the relation of trustees and *cestuis que trust* is admitted or clearly established,<sup>4</sup> the *cestuis que trust*, as the true owners of the fund, have the right to the production and inspection of all the documents and papers relating to it. Where the trustee has taken the opinion of counsel for his guidance as trustee, the *cestuis que trust* have the right to see it, as it must be paid for out of their income.<sup>5</sup> As all the *cestuis que trust* have an interest in the documents, they must all be represented, directly or indirectly, in court, before a final disposition can be made of the papers;<sup>6</sup> but parties to bills, notes, bonds, or mortgages due to the trust estate need

447. The *cestui que trust* has a right to call upon the trustee for accurate information. *Springett v. Dashwood*, 2 Gif. 521; *Walker v. Symonds*, 3 Swanst. 58; *Newton v. Askew*, 11 Beav. 152; *Gray v. Haig*, 20 Beav. 219, n.; *Burrows v. Wells*, 5 De G., M. & G. 253; *Clare v. Ormond*, Jac. 120; *Pearse v. Green*, 1 J. & W. 140; *Hardwick v. Vernon*, 14 Ves. 510; *White v. Lincoln*, 8 Ves. 363; *Turner v. Corney*, 5 Beav. 515; *Anon.*, 4 Madd. 473; *Kemp v. Burr*, 4 Gif. 348; *Wrae v. Seed*, id. 425. If a trustee stand by and see his cotrustee render improper accounts, he will make himself guilty of misrepresentation. *Horton v. Brocklehurst*, 29 Beav. 504. And so legatees have a right to proper explanations of the condition of the estate of a testator. *Ottley v. Gibby*, 8 Beav. 602.

<sup>1</sup> Ibid.

<sup>2</sup> *Smith v. Barnes*, L. R. 1 Eq. 65.

<sup>3</sup> *Airy v. Hall*, 12 Jur. 1043.

<sup>4</sup> *Wynne v. Humberstone*, 27 Beav. 421.

<sup>5</sup> Ibid.; *Devaynes v. Robinson*, 20 Beav. 42; *Talbot v. Marshfield*, 2 Dr. & Sm. 285.

<sup>6</sup> *Bugden v. Tylee*, 21 Beav. 545.

not be before the court, if they are not *cestuis que trust*.<sup>1</sup> So trustees have the right to see the books and papers relating to the trust in the hands of their cotrustees.<sup>2</sup>

§ 823. But so long as the relation of trustee and *cestuis que trust* is not admitted, or is not established, the *cestuis que trust* are strangers, and are not entitled to inspect the documents;<sup>3</sup> and where litigation is pending or contemplated between the trustee and *cestuis que trust*, and the trustee takes the opinion of counsel in relation to his rights against them, they have no right to see the opinion.<sup>4</sup>

§ 824. An order to pay the fund into court may be made at the final hearing, although it was not made upon an interlocutory application;<sup>5</sup> and such order may be made at the final hearing without notice or motion,<sup>6</sup> and it may be made, although a *distringas* or injunction has been previously obtained.<sup>7</sup>

§ 825. If the fund in the hands of the trustee consists of money, he will be ordered to pay it into court forthwith; if it consists of stocks, an immediate transfer will be ordered; if of mortgages or other property, a reasonable time, according to the circumstances, will be allowed in the order for the payment into court.<sup>8</sup> If a trustee should dispose of the fund during the pendency of proceedings for payment of the fund into court, he would be punished as for contempt of court.<sup>9</sup>

<sup>1</sup> Gough v. Offley, 5 De G. & Sm. 653.

<sup>2</sup> Sloo v. Law, 3 Blatch. 459.

<sup>3</sup> Wynne v. Humberstone, 27 Beav. 421.

<sup>4</sup> Talbot v. Marshfield, 2 Dr. & Sm. 285; Brown v. Oakshott, 12 Beav. 252; Devaynes v. Robinson, 20 Beav. 42.

<sup>5</sup> Governesses' Institution v. Rushbridget, 18 Beav. 467.

<sup>6</sup> Isaacs v. Weatherstone, 10 Hare, App. 30.

<sup>7</sup> Lewin on Trusts, 730.

<sup>8</sup> Vigrass v. Binfield, 3 Madd. 62; Hinde v. Blake, 4 Beav. 597; Roy v. Gibbon, 4 Hare, 65; Wyatt v. Sherratt, 3 Beav. 498; Score v. Ford, 7 Beav. 333.

<sup>9</sup> Wartram v. Wartram, Taney, 362.

§ 826. If a plaintiff is clearly entitled to a fund;<sup>1</sup> or if he has a certain partial interest in a fund, and all the other parties are before the court;<sup>2</sup> or if the other parties interested are not necessary parties to the suit;<sup>3</sup> (a) or if he has a contingent interest, and there is no doubt that the defendant is trustee for some one,<sup>4</sup> an order will be entered that the money be paid into court, if any misconduct is shown on the part of the trustee.<sup>5</sup> And so where the plaintiff is entitled to a share of a fund which is clearly divisible into proportions.<sup>6</sup> Such orders were at one time entered as a matter of course upon the facts appearing in the answer, and Vice-Chancellor Kindersley said that he adhered to that practice.<sup>7</sup> But Lord Langdale said that the order would not be made, unless the misconduct of the trustee endangered the safety of the trust fund.<sup>8</sup> So trustees who have a discretionary power over the

<sup>1</sup> *Freeman v. Fairlee*, 3 Mer. 29; *Dubless v. Flint*, 4 M. & C. 502; *McHardy v. Hitchcock*, 11 Beav. 77.

<sup>2</sup> *Ross v. Ross*, 12 Beav. 89; *Whitmarsh v. Robertson*, 4 Beav. 26; *Bartlett v. Bartlett*, 4 Hare, 631.

<sup>3</sup> *Wilton v. Hill*, 2 De G., M. & G. 807; *Hammond v. Walker*, 3 Jur. (N. s.) 686; *Marryatt v. Marryatt*, 23 L. J. (N. s.) Ch. 876; *Lewellin v. Cobbold*, 1 Sim. & Gif. 572.

<sup>4</sup> *Dolder v. Bank of England*, 10 Ves. 355; *Whitmore v. Turquand*, 1 John. & H. 296; *Dubless v. Flint*, 4 M. & C. 502; *McHardy v. Hitchcock*, 11 Beav. 73.

<sup>5</sup> *Ross v. Ross*, 12 Beav. 89; *Rothwell v. Rothwell*, 2 S. & S. 217; *Richardson v. Bank of England*, 4 M. & C. 184; *Meyer v. Montrion*, 4 Beav. 343; *Hinde v. Blake*, id. 597; *Johnson v. Aston*, 1 S. & S. 73; *Freeman v. Fairlee*, 3 Mer. 39; *Vigrass v. Binfield*, 3 Madd. 62; *Collis v. Collis*, 2 Sim. 366; *Wyatt v. Sherratt*, 3 Beav. 499; *Widdowson v. Duck*, 3 Mer. 494; *Contee v. Dawson*, 2 Bland, 264; *Hosack v. Rogers*, 9 Paige, 468; *Bartlett v. Bartlett*, 4 Hare, 631; *Nokes v. Seppings*, 2 Phil. 19; *Boschetti v. Power*, 8 Beav. 98; *Marryatt v. Marryatt*, 23 L. J. Ch. 876; *Clogett v. Hill*, 9 G. & J. 81; *Bourne v. Mole*, 8 Beav. 177; *Futter v. Jackson*, 6 Beav. 424.

<sup>6</sup> *Rogers v. Rogers*, 1 Anst. 174; *Hammond v. Walker*, 3 Jur. (N. s.) 686; *Score v. Ford*, 7 Beav. 336.

<sup>7</sup> *Robertson v. Scott*, 1 W. N. 114.

<sup>8</sup> *Ross v. Ross*, 12 Beav. 89.

fund will not be ordered to pay it into court, if it appear that they intend to exercise their discretion in good faith.<sup>1</sup>

§ 827. An order for payment into court will not be made, except upon an equity clearly stated in the plaintiff's bill, although some other equity may appear from defendant's answer;<sup>2</sup> and the merits upon which the prayer or motion is made must substantially appear in defendant's answer, as no evidence *aliunde* can be introduced upon the merits;<sup>3</sup> and so the plaintiff's interest or title should appear in the answer.<sup>4</sup> So it should appear in defendant's answer that he has received the trust fund;<sup>5</sup> but it need not appear that the trustees actually have the money in their hands; for if they state that they have received the fund, and have applied it, or invested it in a manner not authorized, they will be ordered to bring it into court.<sup>6</sup> Where an executor admits funds to have come to his hands, he may be allowed to show by affidavit what debts he has paid, and he will be ordered to pay in the balance only.<sup>7</sup> Payment into court is ordered where the trustees admit the receipts of funds, and do not show any legal discharge;<sup>8</sup> but it is not ordered where the

<sup>1</sup> Talbot *v.* Marshfield, 2 Dr. & Sm. 285.

<sup>2</sup> Proudfoot *v.* Hume, 4 Beav. 476.

<sup>3</sup> Beaumont *v.* Meredith, 3 V. & B. 181; Richardson *v.* England, 4 M. & C. 171; Dubless *v.* Flint, *id.* 502; Black *v.* Creighton, 2 Moll. 554; Green *v.* Pledger, 3 Hare, 171; Boschetti *v.* Power, 8 Beav. 98; McTighe *v.* Dean, 22 N. J. Eq. 81.

<sup>4</sup> Dubless *v.* Flint, 4 M. & C. 502; McHardy *v.* Hitchcock, 11 Beav. 73; Bank of Turkey *v.* Ottoman Co., L. R. 2 Eq. 366.

<sup>5</sup> See cases cited in last note.

<sup>6</sup> Ingle *v.* Partridge, 32 Beav. 661; Phillipo *v.* Munnings, 2 M. & C. 309; Meyer *v.* Montrion, 4 Beav. 346; Futter *v.* Jackson, 6 Beav. 424; Scott *v.* Becher, 4 Price, 350; Nokes *v.* Seppings, 2 Phil. 19; Vigrass *v.* Binfield, 3 Madd. 62; Collis *v.* Collis, 2 Sim. 365; Roy *v.* Gibbon, 4 Hare, 65; Wyatt *v.* Sherratt, 3 Beav. 498; Costeker *v.* Horrox, 3 Y. & Col. 530; Hinde *v.* Blake, 4 Beav. 597; Bourne *v.* Mole, 8 Beav. 177; Rothwell *v.* Rothwell, 2 S. & S. 217; Hagell *v.* Currie, L. R. 2 Ch. 449.

<sup>7</sup> Anon., 4 Sim. 359; Proudfoot *v.* Hume, 4 Beav. 476; Roy *v.* Gibbon, 4 Hare, 65.

<sup>8</sup> Peacham *v.* Daw, 6 Madd. 98; Richardson *v.* England, 4 M. & C. 174; Rothwell *v.* Rothwell, 2 S. & S. 217.

trustees admit facts only from which a liability may be inferred;<sup>1</sup> thus if they admit funds in their hands in such manner that it may be inferred that they ought to pay interest, they will not be ordered to pay the interest into court until the final hearing;<sup>2</sup> but if they admit that they have received interest, they may be ordered to pay it into court with the fund.<sup>3</sup> And so if the trustees admit that they owe a debt to the trust estate, they may be ordered to pay it into court at once, as the persons to receive and pay the debt are the same.<sup>4</sup> The court can compel the performance of its decrees by process against the parties as for contempts.<sup>5</sup>

§ 827 a. At common law a man cannot attach to a grant of property or estate, otherwise absolute, the condition that it shall not be alienated, and in England, Rhode Island, South Carolina and North Carolina, the same rule is adopted as to equitable estates for life; but in Pennsylvania, Vermont and Massachusetts, the founder may provide that the income shall not be alienable by anticipation, nor subject to be taken for debts until paid over to the *cestui*.<sup>6</sup> (a) It is not

<sup>1</sup> Ibid.

<sup>2</sup> Woods v. Downes, 1 V. & B. 50.

<sup>3</sup> Ibid.; Freeman v. Fairlee, 3 Mer. 43; Rothwell v. Rothwell, 2 S. & S. 217.

<sup>4</sup> Richardson v. Bank of England, 4 M. & C. 174; White v. Barton, 19 Beav. 192.

<sup>5</sup> Chew's App., 4 Penn. St. 247.

<sup>6</sup> Broadway Nat'l Bank v. Adams, 133 Mass. 170, and cases there cited. See §§ 386, 670, 671.

(a) Such trusts, which include spendthrift trusts, whereby a fund is created for the support of the beneficiary, without power in him to alienate, or in his creditors to reach the fund or its income, are upheld in England, and in Massachusetts, Maine, Pennsylvania, Maryland, Vermont, New Jersey, Iowa, Illinois, Missouri, Mississippi, Virginia, Texas, and California. They are invalid in New York, Rhode Island, Georgia, Alabama, North Carolina, South Carolina, Ohio, and Kentucky. See Chambers v. Smith, 3 A. C. 795; Re Bullock, 64 L. T. 736; Potter v. Couch, 141 U. S. 296; Wetmore v. Wetmore, 149 N. Y. 520; Linn v. Davis, 58 N. J. L. 29; Stone v. Westcott, 18 R. I. 685; Seitzinger's Estate, 170 Penn. St. 500; Brown v. Macgill, 87 Md. 161;

possible, however, for a man to create a trust to pay the income to *himself* for life, with a provision against alienation by anticipation, so as to prevent his creditors from coming at the income by a bill in equity.<sup>1</sup> (a) A *cestui* having a vested equitable interest though contingent may convey it subject to the contingency.<sup>2</sup> Upon application of all the *cestuis*, money coming from the condemnation of a portion of the trust property to railroad purposes may be devoted to the erection of needed buildings.<sup>3</sup> Purchase of land for the use of another creates a resulting trust, and the *cestui* may mortgage or sell the land subject to the right of the trustee to have the land paid for out of its proceeds.<sup>4</sup> A life *cestui* cannot mortgage the estate.<sup>5</sup>

<sup>1</sup> Pacific Nat'l Bank v. Windram, 133 Mass. 175 ; Jackson v. Von Zedlitz, 136 Mass. 342.

<sup>2</sup> Whipple v. Fairchild, 139 Mass. 262.

<sup>3</sup> Matthews v. Dellicker, 39 N. J. 90.

<sup>4</sup> Witte v. Wolfe, 16 S. C. 257.

<sup>5</sup> Barnes v. Dow, 59 Vt. 530.

Smith v. Towers, 69 Md. 77 ; Steib v. Whitehead, 111 Ill. 247 ; King v. King, 168 Ill. 273 ; Bennett v. Bennett, 66 Ill. App. 28 ; Slattery v. Watson, 151 Mass. 266 ; Wemyss v. White, 159 Mass. 484 ; Seymour v. McAvoy, 121 Cal. 438 ; Meek v. Briggs, 87 Iowa, 610 ; Bland v. Bland, 90 Ky. 400 ; Pinkston v. Semple, 92 Ala. 564 ; Young v. Easley, 94 Va. 193 ; Huntington v. Jones (Conn.), 43 Atl. 564 ; Kingman v. Winchell (Mo.), 20 S. W. 296 ; Chase v. York C. S. Bank, 89 Texas, 316 ; Patten v. Herring, 9 Tex. Civ. App. 640 ; Gray, Restraints on Alienation (2d ed.), § 177 *et seq.* ; 1 Ames on Trusts (2d ed.), 401, 405 ; 50 Alb. L. Journal, 6 ; 23 Am. & Eng. Encl. of Law, p. 5 ; 28 Am. L. Rev. 230. This question is to be determined by the local law where the property has its situs. Spindle v. Shreve, 111 U. S. 542. When the beneficiary can control or alienate his interest in the trust estate, such interest is properly subject to his debts. Reynolds v. Hanna, 55 F. R. 783 ; Brooks v. Reynolds, 59 id. 923. In some jurisdictions, as, *e.g.*, in Michigan and New York, the surplus income over what is needed for maintenance, is liable for the *cestui's* debts. Spring v. Randall, 107 Mich. 103 ; Gray, Restraints on Alienation (2d ed.), p. 292. (a) Brown v. Macgill, 87 Md. 161 ; Thompson v. Murphy, 10 Ind. App. 464 ; Sargent v. Burdett, 96 Ga. 111 ; Burling v. Newlands, 112 Cal. 476 ; Wainwright v. Low, 132 N. Y. 313

§ 827 *b*. The administrator of a *cestui que trust* is entitled only to that portion of the income which accrued between the last payment and the death of the *cestui*.<sup>1</sup>

§ 828. Trust property or property substituted for it may be recovered from the trustee and all persons having notice of the trust.<sup>2</sup> So long as the fund can be distinctly traced the chancellor will follow it and fasten the purpose of the trust upon it, unless the rights of innocent third parties have intervened.<sup>3</sup> But if the identity of the fund is lost, as by mixture with private funds, and the whole deposited to a private account, the *cestui* will stand on no better footing than other creditors of the trustee.<sup>4</sup> (a) As against the trus-

<sup>1</sup> White *v.* Stanfield, 146 Mass. 424.

<sup>2</sup> Bundy *v.* Monticello, 84 Ind. 119, see § 128.

<sup>3</sup> Third Nat'l Bank *v.* Stillwater Gas Co., 36 Minn. 75; Allen *v.* Russell, 78 Ky. 112; St. Louis Union Society *v.* Mitchell, 26 Mo. App., 206; Coggsell *v.* Griffith, 23 Neb. 334; Vance *v.* Kirk, 29 W. Va. 344; McLaughlin *v.* Fulton, 104 Penn. St. 161.

<sup>4</sup> Portland, &c. Steamboat Co. *v.* Locke, 73 Maine, 370. See Fowler *v.* True, 76 Maine, 43.

(a) A *cestui que trust* may be estopped by his own acts from calling his trustees to account. Evans *v.* Benyon, 37 Ch. D. 329; Crichton *v.* Crichton, [1896] 1 Ch. 870. But, in general, so long as trust property can be really identified in its original or in a substituted form, it belongs to the original owner, if he elects to claim it; and if it passes into the hands of an innocent purchaser for value, the title of the defrauded owner, at his option, at once attaches to the avails, so long as their identity is preserved, without regard to the number of transmutations through which the property has passed. *In re Hallett & Co.*, [1894] 2 Q. B. 237; McMahon *v.* Fetherstonhaugh, [1895] 1 Ir. R. 83; Patten *v.* Bond, 60 L. T. 583; Cavin *v.* Gleason, 105 N. Y. 256; Roca *v.* Byrne, 145 N. Y. 182; Little *v.* Chadwick, 151 Mass. 109; Third Nat. Bank *v.* Stillwater Gas Co., 36 Minn. 75; Whittle *v.* Vanderbilt M. Co., 83 F. R. 48; Dolliver *v.* Dolliver, 94 Cal. 642; Orcutt *v.* Gould, 117 Cal. 315; Mut. Acc. Ass'n *v.* Jacobs, 141 Ill. 261; Ellison *v.* Moses, 95 Ala. 221; Griswold *v.* Griswold, 111 Ala. 572; Arbuckle *v.* Kirkpatrick, 98 Tenn. 221; McLeod *v.* Evans, 66 Wis. 401; Burnham *v.* Barth, 89 Wis. 362; Gianella *v.* Momsen, 90 Wis. 476; Feamster *v.* Feamster, 35 W. Va. 1; Stevenson *v.* Kyle, 42 W. Va. 229; Ferchen *v.* Arndt, 26 Oregon, 121; Evangelical Synod *v.*

tee himself, however, the mere mingling of the trust funds in a private deposit will not necessarily prevent their identifica-

Schoeneich, 143 Mo. 652; Pundmann v. Schoenich, 144 Mo. 149; Hopkins v. Burr, 24 Col. 502. When, however, the *cestui que trust* cannot show that the specific property claimed is his, or that the trust fund has gone into and forms a part of the estate he seeks to charge, he has no preference or lien, but can only share with the trustee's other creditors. Ibid.; Slater v. Oriental Mills, 18 R. I. 352; Shields v. Thomas, 71 Miss. 260; Ferchen v. Arndt, 26 Oregon, 121; Nonotuck Silk Co. v. Flanders, 87 Wis. 237; *supra*, § 44, n. (b). The same rules apply when property belonging to different trust estates is commingled. Leake v. Watson, 58 Conn. 332.

In *Frelinghuysen v. Nugent*, 36 F. R. 229, 239, Bradley, J., said: "Formerly the equitable right of following misapplied money or other property into the hands of the person receiving it, depended upon the ability of identifying it; the equity attached only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguished, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held, as the better doctrine, that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giv-

ing to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried."

"If the trust fund has been dissipated in the transaction of the trustee's business before insolvency, it will be impossible to demonstrate that the estate has been thereby increased or better prepared to meet the demands of creditors, and even if it is proven that the trust fund has been but recently disbursed, and has been used to pay debts that otherwise would be claims against the estate, there would be manifest inequality in requiring that the money so paid out should be refunded out of the assets, for in so doing the general creditors whose demands remain unpaid are in effect contributing to the payment of the creditors whose demands have been extinguished by the trust fund. Per Gilbert, Cir. J., in *Spokane County v. First Nat. Bank*, 68 F. R. 979, 982. See also *Met'n Nat. Bank v. Campbell Commission Co.*, 77 id. 705.

Even when the trustee has so commingled his own money with the trust fund that they cannot be separated, it has been held in some courts that checks drawn by him against the fund are presumed to be drawn against his own part of the money, or restitution may be had from his other funds, when other claimants will not be thereby injured. See *Peters v. Bain*, 133 U. S. 670; *Drovers' & M. Nat. Bank v. Roller*, 85 Md. 495; *Standard Oil*



tion. If equity can follow the fund into the deposit and it is still there, that is sufficient. And in the absence of facts showing the contrary, the presumption is that money drawn out of a mixed deposit by the trustee for his own uses is taken from the portion of the fund that is his own, whatever were the relative dates of the deposits.<sup>1</sup> But if the trustee, after the mixture, takes out a proper portion of the funds as the property of the *cestui*, and buys land with it in his own name, the trust will attach to the land. A trustee need not have bought the property with the very dollars received by him in trust; if he uses or loses the trust dollars and substitutes others, the latter become impressed with the trust.<sup>2</sup> And the better opinion on authority now is that, even as to creditors, the mixing of trust funds with private in a general deposit does not obliterate the trust. The trustee, or those claiming through him, can have only so much as they can distinguish as theirs.<sup>3</sup> (a) But to entitle the trust creditor to preference it must at least appear that the fund remaining for distribution contains the proceeds of the trust.<sup>4</sup> A proper deposit of trust money with consent of the *cestui*, with a banking firm of which the trustee is a partner, ceases to be trust money in the hands of the bank, and the *cestui* cannot

<sup>1</sup> Hall v. Otis, 77 Maine, 122.

<sup>2</sup> Houghton v. Davenport, 74 Maine, 590.

<sup>3</sup> Harrison v. Smith, 83 Mo. 216; Mills v. Post, 76 Mo. 426, not being followed.

<sup>4</sup> *In re Cavin v. Gleason*, 105 N. Y. 256.

Co. v. Hawkins, 74 F. R. 395; Myers v. Board of Education, 51 Kansas, 87; Union Nat. Bank v. Goetz, 138 Ill. 127; Davenport Plow Co. v. Lamp, 80 Iowa, 722; 48 Albany L. J. 384. See Rochefoucauld v. Boustead, [1898] 1 Ch. 550; Bangor v. Beal, 85 Maine, 129; *In re Hodges*, 66 Vt. 70; *In re Thompson*, 101 Cal. 349; Faulkner v. Hendy, 103 Cal. 15; Hunt v. Smith (N. J. Eq.), 43 Atl. 428.

The case of Holmes v. Gilman, 138 N. Y. 369, goes the length of holding that policies of insurance issued to a wife upon the life of her husband, who paid the premium thereon out of his misappropriations from the funds of a partnership, of which he was a member, are impressed with a trust in favor of the firm.

(a) Farwell v. Kloman, 45 Neb. 424.

be preferred to other creditors.<sup>1</sup> If the trustees convey the estate by a breach of the trust, the *cestui que trust*<sup>2</sup> may follow<sup>3</sup> the estate into the hands of a volunteer,<sup>4</sup> whether he had notice of the trust or not;<sup>5</sup> and into the hands of one who takes by descent from any other than a *bona fide* purchaser without notice;<sup>6</sup> and into the hands of a purchaser for value, if he has notice of the trust.<sup>7</sup> Equity will follow trust funds into the hands of any one with notice.<sup>8</sup> But the vendee in such cases will be charged as trustee only to the

<sup>1</sup> *Mills v. Swearingen*, 67 Tex. 270.

<sup>2</sup> The State as well as an individual may follow a fund wrongfully converted. *State v. Bevers*, 86 N. C. 588.

<sup>3</sup> On the subject of following trust property, see Parsons' Edition of *Morse on Banks and Banking*, § 565, note 1.

<sup>4</sup> Clear evidence is required where want of consideration is relied on. *Dalton v. Dalton*, 14 Nev. 427. A conveyance for one dollar is a violation of the trust, and amounts only to a gift. *Everett v. Texas M. Ry. Co.*, 67 Tex. 430.

<sup>5</sup> See *ante*, §§ 217, 223; *Mansell v. Mansell*, 2 P. Wms. 679; *Saunders v. Dehew*, 2 Vern. 271; 2 Freem. 123; *Langton v. Astrey*, 2 Ch. R. 30; *Nels.* 126; *Bell v. Bell*, Ll. & G. t. Plunk. 50; *Pye v. George*, 2 Salk. 680; 1 Rep. 122 b; *Burgess v. Wheate*, 1 Ed. 219; *Spurgeon v. Collier*, id. 55; *Cole v. Moore*, Mose. 806; *Bourset v. Savage*, L. R. 2 Eq. 134; *Hazeltine v. Fourney*, 120 Ill. 493; *Cobb v. Knight*, 74 Maine, 253; *Kennedy v. Baker*, 59 Tex. 151. But third parties cannot require a *cestui que trust* to follow the trust property into the hands of purchasers for their protection. *Barr v. Cabbage*, 52 Mo. 404; *Smith v. Bowen*, 35 N. Y. 83; *Lyford v. Thurston*, 16 N. H. 399.

<sup>6</sup> *Derry v. Derry*, 74 Ind. 560.

<sup>7</sup> *Ibid.*; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Joor v. Williams*, 38 Miss. 546; *Jones v. Shaddock*, 41 Ala. 262; *Lathrop v. Bampton*, 31 Cal. 17; *Aynsworth v. Halderman*, 2 Duv. 655; *Parker v. Jones*, Adm'r, 67 Ala. 234; *Bates v. Kelley*, 80 Ala. 142; *Hill, Fontaine & Co. v. Coolidge*, 33 Ark. 626. One taking with notice of the facts acquires no better estate than his vendor. *Eversdon v. Mayhew*, 65 Cal. 163; *Gilbert v. Sleeper*, 71 Cal. 293; *Minton v. Pickens*, 24 S. C. 592; *Barwick v. White*, 2 Del. Cl. 284; *Planters' Bank v. Prater*, 64 Ga. 609; *Willis v. Foster*, 65 id. 82; *Carmichael v. Foster*, 69 Ga. 372; *Union Mut. Life Ins. Co. v. Spaid*, 99 Ill. 249. One who takes a mortgagee's title holds it in trust for the owner of the debt which the mortgage was intended to secure. *Jordan v. Cheney*, 74 Maine, 359; *Hobson v. Whitlow*, 80 Va. 784; *Covington v. Anderson*, 84 Tenn. 310.

<sup>8</sup> *Knight v. Knight*, 75 Ga. 386.

extent of the interest which the vendor trustee had at the time of the sale.<sup>1</sup> Taking bonds or other negotiable paper as security for a pre-existent debt will not in some States constitute the taker a purchaser for value so as to protect him from the true owner.<sup>2</sup> Even the statute of limitations does not apply to a purchaser taking the property with full notice of the trust, and therefore by fraud.<sup>3</sup> The purchaser under such circumstances becomes a trustee, and liable in the same manner as the person from whom he purchased; for, knowing another's rights to the property, he throws away his money.<sup>4</sup> Any collusion between the trustee and purchaser will render the sale voidable.<sup>5</sup> Even trover may be maintained against a purchaser in breach of the trust with full knowledge of the trust.<sup>6</sup> (a) And the rule applies not only to direct or express trusts, but also to all constructive trusts,<sup>7</sup> equitable incumbrances,<sup>8</sup> and liens for resulting trusts<sup>9</sup> and for the purchase-money.<sup>10</sup> But the trust following property

<sup>1</sup> *Rogers v. Marshall*, 3 McCrary (U. S.), 76.

<sup>2</sup> *Reid v. Bank of Mobile*, 70 Ala. 210.

<sup>3</sup> *Rolfe v. Gregory*, 11 Jur. (N. S.) 98.

<sup>4</sup> *Ante*, § 217, and cases cited; *Bovey v. Smith*, 1 Vern. 149; *Phayre v. Peree*, 3 Dow, 129; *Willoughby v. Willoughby*, 1 T. R. 771; *Verney v. Carding*, cited *Joy v. Campbell*, 1 Sch. & Lef. 345; *Flemming v. Page*, Finch, 320; *Backhouse v. Middleton*, 1 Ch. Cas. 173, 208; *Powell v. Price*, 2 P. Wms. 539; *Walley v. Walley*, 1 Vern. 484; *Pearce v. Newlyn*, 3 Madd. 186.

<sup>5</sup> *Scott v. Sierra Lumber Co.*, 67 Cal. 71.

<sup>6</sup> *Kitchen v. Bradford*, 13 Wall. 416.

<sup>7</sup> *Ante*, § 217, p. 190.

<sup>8</sup> *Daniels v. Davison*, 16 Ves. 249; *Brooke v. Bulkely*, 2 Ves. 498; *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Winged v. Lefebury*, 2 Eq. Cas. Ab. 32; *Ferrars v. Cherry*, 2 Vern. 384; *Jackson's Case*, Lane, 60; *Crofton v. Ormsby*, 2 Sch. & Lef. 583; *Kennedy v. Daly*, 1 id. 355.

<sup>9</sup> *Ferrin v. Errol*, 59 N. H. 234, and possession of land is constructive notice of a claim of title, legal or equitable.

<sup>10</sup> *Ante*, § 239, and cases cited; *Kator v. Pembroke*, 1 Bro. Ch.

(a) Possession of chattels must be proved in a suit against a trustee for their conversion. *Louisville Trust Co. v. Stockton*, 75 F. R. 62. *Trover* may be maintained by a foreign trustee under a will without a new probate of the will, as he is the legal owner of the property. *Toronto G. T. Co. v. Chicago, &c.*, R. Co., 123 N. Y. 37.

purchased with trust funds does not arise absolutely; it is optional with the *cestui* to claim the property as subject to the trust, or to repudiate the trust as to the property, and rely on a personal claim against the trustee, and when he becomes aware of his right to elect, he must exercise it within a reasonable time.<sup>1</sup> And a *bona fide* purchaser<sup>2</sup> for a valuable consideration without notice, express or implied, is entitled to full protection.<sup>3</sup> And a *cestui* cannot keep the proceeds of a sale and also recover the property from one who gave value for it.<sup>4</sup> The right of a *cestui* to follow misapplied funds and his right to hold the trustee as a debtor are not concurrent, but alternative. He may elect which right he will stand upon, but having exercised his option and got a judgment or settlement he cannot be allowed to insist on repugnant rights,<sup>5</sup> at least as against other creditors of the trustee. A person will not be compelled to follow a difficult and expensive remedy against land or other property that might be held by her as under a trust, instead of claiming satisfaction out of estate in the hands of debtor. Even the equity of marshalling the securities to save junior creditors will not force her to such pursuit.<sup>6</sup> It may seem that if

202; *Grant v. Mills*, 2 V. & B. 306; *Dunbar v. Tredennick*, 2 B. & B. 320.

<sup>1</sup> *Breit v. Yeaton*, 101 Ill. 242.

<sup>2</sup> Whether at sheriff's sale or private sale. *Milner v. Hyland*, 77 Ind. 458.

<sup>3</sup> *Ante*, §§ 218, 815 c, and cases cited; *Burgess v. Wheate*, 1 Ed. 195; *Millard's Case*, 2 Freem. 43; *Mansell v. Mansell*, 2 P. Wms. 681; *Trevor v. Trevor*, 1 id. 633; *Harding v. Hardrett*, Finch, 9; *Cole v. Moore*, Mose. 806; *Payne v. Compton*, 2 Y. & Col. 457; *Thorndike v. Hunt*, 3 De G. & J. 563; *Taylor v. Blakelock*, 32 Ch. D. 560; *Mobile Life Ins. Co. v. Randall*, 71 Ala. 220; *McCall v. Rogers*, 77 Ala. 352; *Rogers v. Adams*, 66 Ala. 600; *Goldstein v. Goldstein*, 11 Brad. (Ill.) 534; *Gifford v. Bennett*, 75 Ind. 528; *Rooker v. Rooker*, id. 571; *Paulus v. Latta*, 93 Ind. 34. The immediate purchaser under a trust-deed containing power of sale is chargeable with notice, but a subsequent purchaser, if there is nothing upon the face of the deed and no notice in fact, will be protected. *Gunnell v. Cockerill*, 79 Ill. 79.

<sup>4</sup> *Bonner v. Holland*, 68 Ga. 718; *Harris v. Collins*, 75 Ga. 97.

<sup>5</sup> *Hodges v. Bullock*, 15 R. I. 595.

<sup>6</sup> *Clark v. Wright*, 24 S. C. 534.

junior creditors are willing to stand the costs of litigation to subject the land to the trust, it would be proper to order such suit in order to secure all parties so far as possible, or at least that the claim upon the land should be made over for the benefit of the junior creditors displaced by the seniors' choice. The manner of remedy may turn on the question of possession, as, where one who held as trustee of a resulting trust sold the land to an innocent purchaser for value without notice, in an action by the purchaser for a deed it was held that the purchaser and the *cestui* had equal equities, and the one in possession would not be disturbed.<sup>1</sup> Always the bill must specify the property which it identifies with the trust fund.<sup>2</sup>

§ 829. If a purchaser has no notice of the trust at the time, but afterwards discovers the trust, and obtains a conveyance from the trustee, he cannot protect himself by getting in the legal estate; for this is not like getting in a first mortgage, which the mortgagees have a right to transfer to anybody. But notice of the trust, before the conveyance, converts the purchaser into a trustee, and he cannot protect himself by another breach of the trust.<sup>3</sup> But a conveyance may be recorded after notice of the trust.<sup>4</sup>

§ 830. A purchaser without notice from a purchaser with notice is protected; for his own *good faith* is a defence, and the *bad faith* of the vendor, like the *bad faith* of the original trustee in making the sale, cannot injure an innocent party.<sup>5</sup> So a purchaser with notice from a purchaser without notice

<sup>1</sup> *St. Johnsbury v. Morrill*, 55 Vt. 165.

<sup>2</sup> *Howard v. Fay*, 138 Mass. 104.

<sup>3</sup> *Ante*, § 218, p. 191, and cases cited; *Bates v. Johnson*, 1 John. (Eng.) 304; *Langton v. Astrey*, 2 Ch. R. 30; *Nels.* 126; *Carter v. Carter*, 3 K. & J. 617; *Sharples v. Adams*, 32 Beav. 213; *Collier v. McBean*, 34 Beav. 426; *Justin v. Wynne*, 10 Ir. Eq. 489; 12 Ir. Eq. 289.

<sup>4</sup> *Dodds v. Hills*, 2 Hem. & Mil. 426.

<sup>5</sup> *Martin v. Joliffe*, Amb. 313; *Ferrars v. Cherry*, 2 Vern. 384; *Pitts v. Edolph*, Toth. 161; *Salsbury v. Bagott*, 2 Swanst. 608.

is protected, not on his own merit, but on the merit of the innocent purchaser; for if such purchaser could not sell the estate, he would be deprived of one of the valuable attributes of his property;<sup>1</sup> but if the property comes back to the defaulting trustee, the trust will reattach to it,<sup>2</sup> and a similar principle prevails at law.<sup>3</sup> But in case a trustee sells an estate vested in him for a charitable use, the purchaser will be bound by the trust, though he has no notice; and so of an innocent purchaser from the first purchaser;<sup>4</sup> in other respects purchasers of estates devoted to charitable uses are subject to the same rules that govern the purchase of other trust estates.<sup>5</sup>

§ 831. It is a rule of law, that the purchaser of *choses in action*, or personal property not transferable at law, cannot take any other or different title than that held by the vendor; therefore, if a trustee sells *choses in action* and other personal property not transferable, the *cestuis que trust* may follow such *choses* and property into the hands of the purchaser, and charge him with the same equities and trusts that the property was subject to in the hands of the trustee.<sup>6</sup> Persons dealing with trustees and trust property must take notice at their peril of the scope of the authority of the trustee.<sup>7</sup>

<sup>1</sup> *Ante*, § 222, and cases cited; *Bradwell v. Catchpole*, cited *Walker v. Symonds*, 3 Swanst. 78; *Martin v. Joliffe*, Amb. 313; *McQueen v. Farquar*, 11 Ves. 478; *Andrew v. Wrigley*, 4 Bro. Ch. 136; *Salsbury v. Bagott*, 2 Swanst. 608.

<sup>2</sup> *Ante*, § 222, and cases cited; *Bovey v. Smith*, 2 Ch. Cas. 124; 1 Vern. 60, 81, 144; *Kennedy v. Daly*, 1 Sch. & Lef. 379.

<sup>3</sup> *Bovey v. Smith*, 2 Ch. Cas. 126.

<sup>4</sup> *East Greenstead's Case*, Duke, 65; *Sutton Colefield's Case*, id. 68, 94, 173; *Comm'rs of Char. Dona. v. Wybrants*, 2 Jon. & Lat. 194.

<sup>5</sup> See Sugd. V. & P. 722 (14th ed.).

<sup>6</sup> *Cook v. Tullis*, 18 Wall. 332; *Ord v. White*, 3 Beav. 357; *Cockell v. Taylor*, 15 Beav. 105; *Clack v. Holland*, 19 Beav. 262; *Barnard v. Hunter*, 2 Jur. (N. S.) 1213; *Mangles v. Dixon*, 1 McN. & G. 437; 3 H. L. Cas. 702; *Athenæum, &c. Soc. v. Pooley*, 3 De G. & J. 294; *Gray v. Ulrich*, 8 Kans. 112.

<sup>7</sup> *Owen v. Reed*, 27 Ark. 122; *Vernon v. Board, &c.*, 47 Miss. 181.

§ 832. So if a trustee loans the trust fund in breach of the trust, and the borrower has notice of the trust and the breach, he becomes a *quasi* trustee; and he cannot separate the loan from the trust, nor insist that the statute of limitations, which bars a loan as a loan, also bars the remedy for the trust fund in his hands.<sup>1</sup> (a)

§ 833. Notice of *doubtful* equities has been the subject of much discussion. In *Cordwell v. Mackrill*, Lord Northington said: "A man must take notice of a deed on which an equity supported by precedents, the justice of which every one acknowledges, arises, but not the mere construction of words, which are uncertain in themselves, and the meaning of which often depends upon their locality."<sup>2</sup> Sir W. Grant said: "There may be such a doubtful equity that a purchaser is not to be taken to know what will be the decision, and that is all Lord Camden means; but in this case the equity is clear."<sup>3</sup> Lord St. Leonards observed, that *Cordwell v. Mackrill* was of no great authority, though decided by a great judge; and conceived the true rule to be, that where, upon the whole articles, it is plain what construction the court will put upon them had it been called upon to execute them at the time they were made, they should be enforced, however difficult the construction might be, even as against a purchaser with notice; but not after a lapse of time, when there was anything so equivocal or ambiguous in them as to render it doubtful how they ought to be effectuated.<sup>4</sup>

§ 834. Thus the rule, that "heirs of the body" in articles shall be construed "first and other sons," was not established

<sup>1</sup> *Ernest v. Croysdill*, 2 De G., F. & J. 198; *Sheridan v. Joyce*, 7 Ir. Eq. 118; *McLaurin v. Fairly*, 6 Jones, Eq. 118; *Abbott v. Reeves*, 49 Penn. St. 494.

<sup>2</sup> *Cordwell v. Mackrill*, 2 Ed. 347; Amb. 516.

<sup>3</sup> *Parker v. Brooke*, 9 Ves. 588.

<sup>4</sup> *Thompson v. Simpson*, 1 Dr. & War. 491.

(a) If trust funds are fraudulently misappropriated to pay off a mortgage, the claim of the *cestui que trust* may be charged on the land thus benefited by the misappropriation. *Standish v. Babcock*, 52 N. J. Eq. 628.

till about 1720. Lord Hardwicke, therefore, said that notice of *ancient* articles, or articles before the doctrine was established, should not bind a *bona fide purchaser*.<sup>1</sup> But notice of modern articles will affect the purchaser;<sup>2</sup> but even then the articles must be produced, that the court may judge of their character from the whole instrument, and the clearness or doubtfulness of the notice.<sup>3</sup> Where a residuary legatee had enjoyed an estate for nineteen years, which had been mortgaged to the testator in fee, and the heir of the testator recovered the land by ejectment, and mortgaged it, and the residuary legatee neglected to assert his title to the possession for nine years, and then filed a bill and established his claim, it was determined that the mortgagee of the heir after the ejectment was not called upon to notice the right of the residuary legatee, for it was not that "clear and broad equity" which affects a purchaser.<sup>4</sup> But where lands were given to the sole and separate use of a married woman, and the husband in possession made conveyances in mortgage, it was held that the grantees or mortgagees were bound to notice the equitable construction of the will, as a doctrine well understood;<sup>5</sup> and the same rule applies to leases.<sup>6</sup>

§ 835. Not only can the *cestuis que trust* follow the trust property into the hands of third persons, as herein stated, but they can follow the proceeds of it, if it is wrongfully sold, so long as the proceeds can be traced and identified. It has been urged, that, where the conversion is in *pursuance* of the trust, the newly acquired property is bound by the original equity; but where the conversion is wrongful, the acquired property not being in a form consistent with the trust, the *cestuis que trust* are under no obligations to accept

<sup>1</sup> Trevor v. Trevor, 1 P. Wms. 622; Senhouse v. Earle, Amb. 288; West v. Errissey, 2 P. Wms. 349; Warwick v. Warwick, 3 Atk. 291; Davies v. Davies, 4 Beav. 54; Parker v. Brooke, 9 Ves. 587.

<sup>2</sup> See cases cited in last note.

<sup>3</sup> Cordwell v. Mackrill, Amb. 515; 2 Ed. 344.

<sup>4</sup> Hardy v. Reeves, 4 Ves. 466; 5 Ves. 426.

<sup>5</sup> Parker v. Brooke, 9 Ves. 583.

<sup>6</sup> Coppin v. Fernyhough, 2 Bro. Ch. 291.



it in place of the original property, and therefore they must come in as creditors of the trustee, and cannot assert a specific lien upon the substituted property.<sup>1</sup> But this reasoning has been rejected.<sup>2</sup> Lord Ellenborough said, that "an abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him."<sup>3</sup> And it may be added, that an abuse of trust can deprive the *cestuis que trust* of no rights, so long as the property or its proceeds can be traced and identified, in the hands of those who have full knowledge of all the equities.<sup>4</sup>

§ 836. Thus if the trustee invests the trust fund or its proceeds in other property, the *cestui que trust* may follow the fund into the new investment, so long as he can identify the purchase, as made with the trust property or its proceeds, although the trustee has taken the title in his own name, or in the name of any other person with notice of the facts,<sup>5</sup> or

<sup>1</sup> Argument in *Taylor v. Plumer*, 3 M. & S. 562.

<sup>2</sup> *Burdett v. Willett*, 2 Vern. 638; *Ryall v. Rolle*, 1 Atk. 17; *Ex parte Chion*, 3 P. Wms. 187; *Waite v. Whorwood*, 2 Atk. 159; *Ex parte Sayers*, 5 Ves. 169; *Anon. Case*, Sel. Ca. Ch. 57.

<sup>3</sup> *Taylor v. Plumer*, 3 M. & S. 574.

<sup>4</sup> *Whitcomb v. Jacob*, 1 Salk. 160; *Lane v. Dighton*, Amb. 409; *Ryall v. Ryall*, id. 413; *Balguey v. Hamilton*, id. 414; *Lench v. Lench*, 10 Ves. 519; *Chedworth v. Edwards*, 8 Ves. 46; *Greatly v. Noble*, 3 Madd. 79; *Buckeridge v. Glasse*, Cr. & Phil. 126; *Murray v. Pinkett*, 12 Cl. & Fin. 784; *Sheridan v. Joyce*, 1 Jon. & Lat. 401; 7 Ir. Eq. 115; *French v. Harrison*, 17 Sim. 111; *Harford v. Lloyd*, 20 Beav. 310; *Frith v. Cartland*, 2 Hem. & Mil. 417; *Lathrop v. Bampton*, 31 Cal. 17.

<sup>5</sup> *Oliver v. Piatt*, 3 How. 333; *Ex parte Montefiore*, De G. Bank R. 171; *Pierce v. McKeelian*, 3 W. & S. 280; *Bonsall's App.*, 1 Rawle, 274; *Kaufman v. Crawford*, 9 W. & S. 234; *Blaisdell v. Stevens*, 16 Vt. 179; *Turner v. Pettigrew*, 9 Humph. 438; *Moffatt v. McDonald*, 11 Humph. 457; *Sollee v. Croft*, 7 Rich. Eq. 84; *Bomar v. Mullins*, 4 Rich. Eq. 80; *Martin v. Greer*, 1 Ga. Dec. 109; *Garrett v. Garrett*, 1 Strob. Eq. 96; *Cheshire v. Cheshire*, 3 Ired. Eq. 569; *Brothers v. Porter*, 6 B. Mon. 106; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Yerger v. Jones*, 16 How. 36; *Georges v. Pye*, 7 Bro. P. C. 221; 1 P. Wms. 128; *Bush v. Bush*, 1 Strob. Eq. 377; *Bailey v. Inglee*, 2 Paige, 278; *Heth v. Richmond R. R. Co.*, 4 Gratt. 482; *Barksdale v. Finney*, id. 338; *McLeod v. First Nat. Bank*, 42 Miss. 99; *Walker v. Elledge*, 65 Ala. 51; *Dyer v. Jacoway*, 42 Ark. 186.

has transferred the substituted property to a volunteer,<sup>1</sup> or to a purchaser for value, though in the latter case there must be notice;<sup>2</sup> and surplus income mingled with the corpus of the trust estate and invested, makes the life annuitant equitable owner in fee of such a proportion of the land as the amount of income invested bears to the whole cost.<sup>3</sup>

§ 837. Lord King remarked, that "*money* had no ear-mark, insomuch that if a receiver of rents should lay out all the money in the purchase of land, or if an executor should realize all his testator's estate and afterwards die insolvent, a court of equity could not charge or follow the land;"<sup>4</sup> and bank-notes and negotiable bills have been represented as possessing the same quality.<sup>5</sup> In reply to this, Lord Mansfield observes: "It has been quaintly said, that the reason why money cannot be followed is because it has no ear-mark, but this is not true. The true reason is upon account of the currency of it: it cannot be recovered after it has passed in currency. Thus, in the case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but before the money has passed in currency an action may be brought for the money itself. Apply this to the case of a bank-note: an action may lie against the finder, it is true, but not after it has been paid away in currency."<sup>6</sup> And Lord Ellenborough observed, "the *dictum* that money has no ear-mark must be understood as predicated only of an undivided and undistinguishable mass of current money; but money kept in a bag, or otherwise kept apart from other money, — guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, — are so far ear-

<sup>1</sup> Perkins v. Perkins, 134 Mass. 441, 445.

<sup>2</sup> Walker v. Elledge, 65 Ala. 51.

<sup>3</sup> Bazemore v. Davis, 55 Ga. 504.

<sup>4</sup> Deg v. Deg, 2 P. Wms. 414.

<sup>5</sup> Cox v. Bateman, 2 Ves. 19; Whitcomb v. Jacob, 1 Salk. 160; White v. Whorwood, 2 Atk. 159.

<sup>6</sup> Miller v. Race, 1 Burr. 457.

marked as to fall within the rule which applies to every other description of personal property whilst it remains in the hands of the factor or his general legal representatives.”<sup>1</sup> The only distinction between money, notes, bills, and other chattels appears to be this, that the former, for the protection of commerce, cannot be pursued into the hands of a *bona fide* holder, to whom they have passed in circulation, while other chattels can be recovered even from a purchaser for valuable consideration, provided he did not buy them in market overt. Money,<sup>2</sup> notes,<sup>3</sup> and bills<sup>4</sup> may be followed by the rightful owner when they have not been circulated or negotiated, or the person to whom they so passed had express notice of the trust.<sup>5</sup> The only difference between *money* and *notes* or *bills* is, that money is not ear-marked, and therefore cannot be traced except under particular circumstances; but notes and bills, from carrying a number or date, can in general be identified by the owner without difficulty.<sup>6</sup> Thus if trust money is mixed in the same parcel with the trustee’s own money, it may be said that the trust money has run into the general mass and has become absorbed, and that the *cestui que trust* has no lien; but such cannot be the case.<sup>7</sup> (a) If a trustee purchases an estate partly with his own money and partly with trust money, it cannot be predicated that any particular part of the estate was purchased with money of the *cestui que trust*, but he will

<sup>1</sup> Taylor v. Plumer, 3 M. & S. 575.

<sup>2</sup> Taylor v. Plumer, 3 M. & S. 575; Miller v. Race, 1 Burr. 457; Howard v. Jemmet, 3 Burr. 1369; King v. Eggington, 1 T. R. 370; Ryall v. Rolle, 1 Atk. 172.

<sup>3</sup> Ibid.; Anon., 1 Salk. 126; 1 Raym. 738.

<sup>4</sup> Bennett v. Mayhew, cited 1 Bro. Ch. 232; Caton v. Pembroke, 2 Bro. Ch. 287; Frith v. Cartland, 2 Hem. & Mil. 417; *Ex parte* Sayers, 5 Ves. 169; Chedworth v. Edwards, 8 Ves. 46; Ryall v. Rolle, 1 Atk. 172; Raphael v. Bank of England, 17 C. B. 161.

<sup>5</sup> Verney v. Carding, cited Joy v. Campbell, 1 Sch. & L. 345.

<sup>6</sup> Ford v. Hopkins, 1 Salk. 282.

<sup>7</sup> See § 122.

(a) See Knatchbull v. Hallett, Boeckeler, 72 Mo. App. 661; *supra*, 13 Ch. D. 696, 710; Ulrici v. § 122, n.

have a lien on the whole estate for the amount of the trust fund that was misemployed.<sup>1</sup> It follows from this, that, although every identical piece of coin cannot be ascertained in a given mass, yet there being so much trust money in the parcel, the *cestui que trust* is entitled to so much of it.<sup>2</sup> (a)

§ 838. Upon the same principle, if the executor of a deceased partner is also the surviving partner, and he continues the deceased partner's capital without authority in the business, and changes the property many times over, the court follows the trust fund through all these changes, and gives the beneficiaries of the deceased partner's estate the capital and all its proceeds or gains in the business in which it has been employed.<sup>3</sup> So if a trustee deposits trust moneys in bank to his own credit, mixed with other deposits of his own money, the court will disentangle the accounts, and give the *cestuis que trust* what belongs to them.<sup>4</sup> And the same will be done wherever property held in trust has been wrongfully mixed or misapplied, though in the hands of a third person, unless he is a *bona fide* purchaser without notice; but the bill must specify the property which it identifies with the trust fund.<sup>5</sup>

§ 839. Parol evidence is admissible to identify and follow trust money, laid out and invested in land, notwithstanding

<sup>1</sup> *Lane v. Dighton*, Amb. 409; *Lewis v. Madocks*, 17 Ves. 57; *Price v. Blakemore*, 6 Beav. 507; *Hopper v. Conyers*, 12 Jur. (N. S.) 328.

<sup>2</sup> *Pennell v. Deffell*, 4 De G., M. & G. 382; *Ex parte Sayers*, 5 Ves. 169; *Ernest v. Croysdill*, 2 De G., F. & J. 175; *Frith v. Cartland*, 2 Hem. & Mil. 417.

<sup>3</sup> *Ante*, § 430, and cases cited.

<sup>4</sup> *Ante*, § 463, and cases cited.

<sup>5</sup> *Howard v. Fay*, 138 Mass. 104.

(a) *American Sugar Ref. Co. v. O'Brien*, 140 Ill. 146; *Dayton v. Fancher*, 145 N. Y. 552; *Smith v. H. B. Claffin Co.*, 41 N. Y. S. 839; *Combs*, 49 N. J. Eq. 420; *Carley v. Nebraska Nat. Bank v. Johnson*, 51 N. D. 483; *Roach v. Neb.* 546. *Caraffa*, 85 Cal. 436; *Wetherell v.*

the statute of frauds; for in such case the trust created is a resulting or constructive trust, which is not within the letter or spirit of the statute.<sup>1</sup>

§ 840. So where the trust money is followed into the hands of a person who receives it by collusion, or with express notice of the trust, he cannot plead the statute of limitations, for the reason that he becomes himself a trustee.<sup>2</sup> (a)

§ 841. There may be some difficulty, as a *matter of fact*, in tracing the trust property into purchases made by trustees. Thus if a trustee having money in his hands misappropriates the funds, and afterwards purchases lands in his own name, it may be difficult to show that the land was purchased with the trust money; and if the trust money or its proceeds cannot be traced into the lands, the *cestui que trust* cannot have a lien upon them.<sup>3</sup> But if the money can be traced through all its transformations, the law is plain; and the *cestui que trust* can claim the land. Parol evidence is admissible to show all the transactions made with the trust money.<sup>4</sup> Thus the fact that the purchase-money nearly corresponds with the trust fund to be invested is important.<sup>5</sup> So if by a check or other means it can be shown that the trust money was drawn to pay the purchase-money, there can be no doubt.<sup>6</sup> If a trustee make a sale of one estate and purchases another at the same time, or shortly afterwards, it will be presumed to be one transaction, although the purchase-money of the

<sup>1</sup> See *ante*, § 137; Ryall v. Ryall, Amb. 413; Anon., Sel. Ch. Cas. 57; Lane v. Dighton, Amb. 409; Lench v. Lench, 10 Ves. 517; Hopper v. Conyers, L. R. 2 Eq. 549.

<sup>2</sup> Ernest v. Croysdill, 6 Jur. (N. S.) 740; 2 De G., F. & J. 175; Rolfe v. Gregory, 11 Jur. (N. S.) 97; McLaurin v. Fairly, 6 Jones, 375.

<sup>3</sup> Kirk v. Webb, Pr. Ch. 84; Perry v. Phelps, 4 Ves. 108; Roberts v. Broom, 1 Harring. 57; Pharis v. Leachman, 20 Ala. 663.

<sup>4</sup> Lowden v. Lowden, 2 Bro. Ch. 583.

<sup>5</sup> Ibid.; Small v. Attwood, Younge, 507.

<sup>6</sup> Price v. Blackmore, 6 Beav. 507.

estate purchased was larger than of the estate sold, and the *cestui que trust* will have a lien on the estate for the amount of the trust fund paid towards the purchase.<sup>1</sup> So if a trustee is under obligation to lay out a sum of money in land, and he purchase an estate at a price corresponding with the sum to be invested, the court will presume that the purchase was made with trust money.<sup>2</sup> So where a settlor covenanted in marriage articles to settle all his personal estate, a subsequent purchase of real estate was presumed, without evidence, to be made upon the same trusts.<sup>3</sup> (a) But no such presumption can arise when it appears that the trustee was mistaken in the nature of the trust, or acted under any different impression.<sup>4</sup> So where a tenant for life, with power to sell and purchase other estates, purchased other estates with borrowed money, and many years afterwards sold the settled estates, and applied part of the proceeds of them to the payment of the borrowed money, it was held that the purchased estates were not subject to the trusts of the settled estates.<sup>5</sup> So if a trustee sells the whole inheritance where he only had an estate in trust for the life of his wife, and purchases other estates with the money, those in remainder cannot set up a claim to the purchased estates. Their rights are wholly confined to the original estate, and that alone is affected by the sale.<sup>6</sup>

§ 842. Where the trust fund constitutes a part only of the purchase-money of an estate, the court usually gives a lien

<sup>1</sup> Ibid.; *Yerger v. Jones*, 16 How. 36.

<sup>2</sup> Ibid.; *Mathias v. Mathias*, 3 Sm. & Gif. 252; *Anon.*, Sel. Ch. Ca. 57.

<sup>3</sup> *Lewis v. Madocks*, 8 Ves. 150; 17 Ves. 48.

<sup>4</sup> *Perry v. Phelps*, 4 Ves. 108, 116.

<sup>5</sup> *Denton v. Davies*, 18 Ves. 499.

<sup>6</sup> *Noble v. Andrews*, 37 Conn. 346.

(a) In *Finlay v. Darling*, [1897] 1 Ch. 719, it was held, not following *In re Bendy*, [1895] 1 Ch. 109, that when income not originally included in a covenant in a marriage settlement to settle other and after-acquired property is invested by the wife during coverture, these investments are not subject to the covenant.

on the land only for the amount of the trust fund invested and interest;<sup>1</sup> but where the entire land is the fruit of the trust fund, the *cestui que trust* has an election to take the land, or the trust fund and interest.<sup>2</sup> In such case, if a part of the purchase-money remain unpaid, the *cestui que trust* would be required to pay it.<sup>3</sup> But if the trust fund has been used by the trustee to pay his debts, the *cestui que trust* cannot be subrogated to the claims and securities of the creditors whose debts have been paid.<sup>4</sup>

§ 843. If the *cestui que trust* is unable to trace the trust fund into the hands of other persons, or into the hands of third persons other than *bona fide* holders for value, or into other property in the hands of the trustee, or if he elects not to do so, he may proceed against the trustee personally.<sup>5</sup> If the trust property or its proceeds cannot be identified, the *cestui que trust* may proceed against the trustee as against an ordinary creditor,<sup>6</sup> and it is said, that if he elects to proceed against the trustee personally, he cannot also proceed against the trust fund.<sup>7</sup> Where an express promise comes

<sup>1</sup> Lane v. Dighton, Amb. 409; Lewis v. Madocks, 8 Ves. 150; 17 Ves. 48; Price v. Blackmore, 6 Beav. 107; Scales v. Baker, 28 Beav. 91; Hopper v. Conyers, L. R. 2 Eq. 545.

<sup>2</sup> Trench v. Harrison, 17 Sim. 111; Taylor v. Plumer, 3 M. & S. 575. The decision in Savage v. Carroll, 1 B. & B. 265, 284, has not been followed in this respect. Murray v. Lylburn, 2 Johns. Ch. 441; Sollee v. Croft, 7 Rich. Eq. 34; Bonsall's App., 1 Rawle, 274; Kaufman v. Crawford, 9 W. & S. 134; Oliver v. Piatt, 3 How. 333; Thornton v. Stokill, 19 Jur. 751.

<sup>3</sup> Yerger v. Jones, 16 How. 36.

<sup>4</sup> Winder v. Diffenderffer, 1 Bland, 198.

<sup>5</sup> Oliver v. Piatt, 3 How. 333; Flagg v. Mann, 3 Sumn. 486; Hawkins v. Hawkins, 1 Dr. & Sm. 75; Freeman v. Cook, 6 Ired. Eq. 379; Norman v. Cunningham, 5 Grat. 72; Roberts v. Mansfield, 38 Ga. 452; Lathrop v. Bampton, 31 Cal. 17; Calhoun v. Burnett, 40 Miss. 59; Bradley v. Luce, 99 Ill. 234; Long v. Fox, 100 Ill. 171.

<sup>6</sup> Lathrop v. Bampton, 31 Cal. 17.

<sup>7</sup> Barker v. Barker, 14 Wis. 131. And if he elects to proceed against the fund, the whole period during which the trust fund has been held is to be considered. He cannot claim profits of the actual investments for

within the statute of frauds, and cannot be enforced simply because the statute stands in the way, or a trust, or a trust which the law would enforce has been undertaken, and the statute which cuts off resulting trusts prevents a recovery of the subject purchased with the trust funds, the law raises a promise to pay or return the consideration of the contract or trust.<sup>1</sup> Unless some *legal* debt has been created between the parties, or some engagement the non-performance of which may be the subject of damages at law, a court of equity is the only tribunal to which he can have recourse for redress.<sup>2</sup> An action at law for money had and received will not lie against a trustee while the trust is still open; but if a final account is settled, and a balance struck, an action may be maintained.<sup>3</sup> It has been said, however, that an action on the case at law will lie against a trustee, for negligence in the performance of his duty, whereby a loss happens to the *cestui que trust*.<sup>4</sup> So if a sum is set apart as income due to the *cestui que trust*, and the trustee makes an express promise to pay it, an action at law may be maintained.<sup>5</sup> So if a deposit made with a trustee for others is wrongfully obtained from the trustee, an action at law may be maintained for a part and the original fund and interest for the rest. *Baker v. Disbrow*, 25 Hun (N. Y.), 29.

<sup>1</sup> *Mannen v. Bradberry*, 81 Ky. 157; *Montague v. Garnett*, 3 Bush, 298; *Martin v. Martin*, 5 Bush, 56.

<sup>2</sup> *Hearne v. Hearne*, 55 Me. 445; *Brooks v. Brooks*, 11 Cush. 18; *White v. Sheldon*, 4 Nev. 280; *State v. Digges*, 21 Md. 240; *Dorsey v. Garey*, 30 Md. 489; *Curtis v. Smith*, 6 Blatch. 537; *Hukill v. Page*, 6 Bissell, 183; *Norton v. Ray*, 139 Mass. 230.

<sup>3</sup> *Chase v. Roberts*, Holt, N. P. C. 501; *Edwards v. Bates*, 13 L. J. (N. S.) 156; 7 M. & G. 590; *Dias v. Brunell*, 24 Wend. 9; *McCrea v. Purmont*, 16 Wend. 460; *New York Ins. Co. v. Roulet*, 24 Wend. 505; *Beaches v. Dorwin*, 12 Vt. 139; *Brown v. Wright*, 4 Yerg. 57; *Hall v. Harris*, 12 Ired. Eq. 289; *Blue v. Patterson*, 1 Dev. & Bat. Eq. 457; *Archer v. McDuffie*, 5 Barb. 147; *Duval v. Covenhoven*, 4 Wend. 561; *Sotone v. Scott*, 6 Lansing, 274. A mere breach of confidence between parties, there being no subsisting trust or fiduciary relation, will not entitle a party to relief in equity. *Ashley v. Denton*, 1 Lit. 86; *Prescott v. Ward*, 10 Allen, 203; *Underhill v. Morgan*, 33 Conn. 105.

<sup>4</sup> *Bennett v. Preston*, 17 Ind. 291.

<sup>5</sup> *Weston v. Barker*, 12 Johns. 276; *Dias v. Brunell*, 24 Wend. 9.



return of the deposit.<sup>1</sup> In Pennsylvania, however, equitable relief can be given in an action for money had and received,<sup>2</sup> and the same practice prevailed in Massachusetts before full equity jurisdiction was given to the court.<sup>3</sup> But where the trust is fully executed, and the amounts settled, and there remains nothing to be done but for the trustee to pay over the amount to the *cestui que trust*, an action at law may be maintained in all the States for the payment of the amount found due.<sup>4</sup> (a) This is in analogy to the rule in relation to suits between partners. If the partnership is wound up and the accounts stated, and a balance is found due from one partner to another, it may be sued for in an action of assumpsit; but while the partnership is still in existence no action at law can be maintained for any balances supposed to be due growing out of partnership matters not fully settled up. The remedies in courts of equity are so much more satisfactory that it would be much more convenient to sue in them, even though courts of common law had full jurisdiction. Trustees may at all reasonable times be called to account in a court of equity.<sup>5</sup> Trustees in possession are in general held only for actual receipts unless guilty of gross neglect or fraud in diminishing or concealing the receipts. Dealing with the property as their own will not alone make them liable beyond the actual receipts.<sup>6</sup>

<sup>1</sup> Penobscot R. R. Co. v. Mayo, 60 Maine, 306.

<sup>2</sup> Martzell v. Stauffer, Penn. R. 398; Aycinena v. Peries, 6 W. & S. 243.

<sup>3</sup> Newhall v. Wheeler, 7 Mass. 198.

<sup>4</sup> Baker v. Biddle, Baldw. 66, 142; Jordan v. Jordan, 2 Car. L. R. 409; Rogers v. Daniel, 8 Allen, 343; Prescott v. Ward, 10 Allen, 203; Farrelly v. Ladd, id. 127; Cotter v. Birchard, 13 Mich. 110; Derome v. Vose, 140 Mass. 575, 578, citing Gould v. Emerson, 99 Mass. 154, 157.

<sup>5</sup> Dill v. McGehee, 34 Ga. 438.

<sup>6</sup> Hoile v. Bailey, 58 Wis. 434.

(a) Underwood v. Boston Five Cents S. Bank, 141 Mass. 305; Gannon v. Ruffin, 151 Mass. 204; Henchey v. Henchey, 167 Mass. 77. As to promises made by third persons, the tendency is to maintain the common-law rule that one cannot sue upon a contract to which he is not a party, though made for his benefit. See 8 Harv. L. Rev. 93; 9 id. 233; 10 id. 180.

§ 844. If a trustee disposes of the trust estate to a purchaser for a valuable consideration without notice, the *cestui que trust* may compel the trustee to purchase other lands of equal value;<sup>1</sup> or the *cestui que trust* may elect to take the proceeds of the sale with interest.<sup>2</sup> If a trustee whose duty it is to hold certain shares of stock until demanded sells the shares in violation of the trust, the *cestui* can in equity hold other shares of the same company belonging to the trustee to replace the trust stock, and this even when the trustee's estate is insolvent.<sup>3</sup> Where trustees are directed to invest in a particular stock or fund and to accumulate the income, they will be directed to purchase so much of the same stock as the fund if regularly invested and accumulated would have produced.<sup>4</sup>

§ 845. If a trustee neglects to transfer stock,<sup>5</sup> or if he neglects to sell, whereby there is a loss,<sup>6</sup> the *cestui que trust* can recover compensation. So if he neglects to pay the premium upon a policy of insurance, whereby it is forfeited,<sup>7</sup> if he had the means of paying the premium;<sup>8</sup> if he has no means to keep it up, the court will order it to be sold;<sup>9</sup> if he pay the money himself, he will have a lien on the policy.<sup>10</sup> If trus-

<sup>1</sup> *Powlet v. Herbert*, 1 Ves. Jr. 297; *Pocock v. Reddington*, 5 Ves. 794; *Flagg v. Mann*, 2 Sumn. 486; *Oliver v. Piatt*, 3 How. 333; *Mansell v. Mansell*, 2 P. Wms. 681; *Vernon v. Vaudry*, Barn. 303; *Byrchall v. Bradford*, 6 Madd. 235; *Freeman v. Cook*, 6 Ired. Eq. 375; *Norman v. Cunningham*, 5 Grat. 72.

<sup>2</sup> *Att. Gen. v. East Retford*, 2 M. & K. 35; *Denton v. Davies*, 18 Ves. 504.

<sup>3</sup> *Draper v. Stone*, 71 Me. 177.

<sup>4</sup> *Pride v. Fooks*, 2 Beav. 430; *Byrchall v. Bradford*, 6 Madd. 13, 235; *ante*, §§ 469, 472.

<sup>5</sup> *Fenwick v. Greenwell*, 10 Beav. 412. Thus where a trustee sold at an improper time, he was held for the highest value of the estate. *Melick v. Voorhees*, 2 N. J. Eq. 305.

<sup>6</sup> *Devaynes v. Robinson*, 24 Beav. 86.

<sup>7</sup> *Marriott v. Kinnersley*, Tam. 470.

<sup>8</sup> *Hobday v. Peters*, 28 Beav. 603.

<sup>9</sup> *Hill v. Trenery*, 23 Beav. 16; *Beresford v. Beresford*, 23 Beav. 292.

<sup>10</sup> *Clack v. Holland*, 19 Beav. 273; *Johnson v. Swire*, 3 Gif. 194.

tees neglect to give notice of the assignment to them of a *chose in action*, whereby a loss happens to the estate, they will be responsible.<sup>1</sup> So if a trustee is charged with an imperative power, he will be responsible for any loss arising from a neglect to exercise it.<sup>2</sup> If a trustee neglects his duty and abandons the *interests* of the *cestui que trust*, the court may not only compel the trustee to perform his duty, but it may give the *cestui que trust* relief against a third person; as where the trustee refused or neglected to renew a lease, the *cestui que trust* may, upon a proper bill, have a decree for renewal against the lessor, alleging the misconduct of the trustee.<sup>3</sup> A trustee cannot in general protect himself by showing that the *cestui* by due diligence could have prevented the loss following a breach of trust, (a) but where the fault of the trustee consisted in not bringing a suit, and the *cestui* has actually had the trustee removed, and there is still time to bring suit, such proof is admissible, for it shows that the neglect of the trustee did not really lose any claim to the estate.<sup>4</sup> A fraudulent appropriation of trust funds to his own uses will make both the trustee and his bondsmen liable.<sup>5</sup>

§ 846. If a person assumes to act as trustee, and becomes possessed of the trust fund and misapplies it, he cannot protect himself by showing that he was not legally a trustee.<sup>6</sup>

<sup>1</sup> Lewin, 652.

<sup>2</sup> Luther v. Bianconi, 10 Ir. Eq. 194.

<sup>3</sup> Malone v. Geraghty, 5 Ir. Eq. 563.

<sup>4</sup> Cornell, *In re* 110 N. Y. 351.

<sup>5</sup> McKim v. Blake, 139 Mass. 593.

<sup>6</sup> Rackham v. Siddall, 16 Sim. 297; 1 McN. G. 607; Pearce v. Pearce,

(a) See Lummis v. Big Sandy Land Co., 188 Penn. St. 27; Levi v. Gardner (S. C.), 30 S. C. 616; 1 Ames on Trusts (2d ed.), 305. A ward who is the owner of a certificate of stock which his guardian has indorsed in blank and deposited for safe keeping in a bank, whence it is fraudulently abstracted by the cashier and pledged for his personal debt, is not estopped by the negligence of his guardian from reclaiming the certificate of stock from the person to whom it was pledged by the cashier. O'Herron v. Gray, 168 Mass. 573.

So if the trustee is a member of a firm, and the trust fund is invested in the business of the partnership, the firm must account;<sup>1</sup> (a) and corporations are liable if the trust fund finds its way into their hands.<sup>2</sup> A solicitor who is a trustee will be liable to make good all losses that occur from a breach of the trust; and he may be struck from the rolls of the court for a wilful breach.<sup>3</sup> (b) A solicitor who wilfully advises a breach of the trust may be struck from the rolls.<sup>4</sup> A purchaser who knew that the sale was oppressive cannot hold the trust property nor claim for improvements when the sale is set aside, unless the owner demand the rents.<sup>5</sup>

22 Beav. 248; *Derbishire v. Home*, 3 De G., M. & G. 80; *Hope v. Liddell*, 21 Beav. 183; *Life Asso. of Scotland v. Siddall*, 3 De G., F. & J. 58; *Hennessey v. Bray*, 33 Beav. 96. A *de facto* trustee is liable just as if he were trustee *de jure* at the time of the breach of trust. *Brown v. Lambert's Adm'r*, 74 Va. 256. In this case a trustee *de facto* wrongfully selling property was held liable for the proceeds to the *cestuis*, although the value of the property (slaves) had been destroyed by their emancipation before the rights of the claimants vested.

<sup>1</sup> *Eager v. Barnes*, 31 Beav. 579.

<sup>2</sup> *Att. Gen. v. Leicester*, 9 Beav. 546.

<sup>3</sup> *In re Chandler*, 22 Beav. 253; *In re Hall*, 2 Jur. (N. S.) 633.

<sup>4</sup> *Goodwin v. Gosnell*, 2 Coll. 457. See *Barnes v. Addy*, L. R. 9 Ch. 251.

<sup>5</sup> *Littell v. Grady*, 38 Ark. 584.

(a) This rule has the support of *Palmer v. Scott*, 68 Ala. 380; *Welker v. Wallace*, 31 Ga. 362. In Mississippi, it is held that a bill cannot be maintained against the firm to recover from it trust money thus put into its assets by one partner, without his copartner's participation, and that the knowledge of the guilty party in such case is not the knowledge of the firm. *Pickels v. McPherson*, 59 Miss. 216; *Gilruth v. Decell*, 72 Miss. 232.

(b) In England one member of a firm of solicitors has no implied authority to make himself a con-

structive trustee so as to make his partners liable. *Mara v. Browne*, [1896] 1 Ch. 199. So the solicitors of a mortgagee trustee are not liable for insufficiency of the security, though the mortgage money was paid through them. *Brinsden v. Williams*, [1894] 3 Ch. 185. Yet where one member of a firm of solicitors so took upon himself the management of a trust as to constitute himself a trustee, it was held to be the duty of the firm to see that the money paid into their hands was not applied improperly. *Blyth v. Fladgate*, [1891] 1 Ch. 337.

If a trustee embezzles the trust funds that come to his hands, he may be indicted on the criminal side of the court.<sup>1</sup> Executors and administrators of a trustee will be answerable for a breach of trust, though they may have distributed the assets without notice of the claim; but if the distribution is made by order of the court, they will not be liable;<sup>2</sup> nor if the time limited for suits against them has expired; though they cannot plead the general statute of limitations to a breach of trust by the testator.

§ 847. In awarding compensation to the *cestui que trust* for a breach of trust by the trustee, the court does not regard it as material that the trustee has made no profit or advantage out of the estate.<sup>3</sup> If there is a breach of the trust, and an inevitable calamity destroys the property, the trustee must account for it.<sup>4</sup> If he acts strictly within the line of his duty, he will be responsible for no loss; but if he varies from his duty, he must account for the property in all events.<sup>5</sup> So if a loss happens through a breach of the trust as to one part of the estate, the trustee cannot set off against the loss a gain that he has made to another part of the estate, through another distinct and wholly disconnected breach of trust.<sup>6</sup> But a trustee will not be charged with

<sup>1</sup> *Regina v. Fletcher, Leigh & Cave*, C. C. 180; 9 Cox C. C. 189; 31 L. J. M. C. 206; *Shaw v. Spencer*, 100 Mass. 388.

<sup>2</sup> *Knatchbull v. Fearnhead*, 3 M. & C. 122; *March v. Russell*, id. 31; *Low v. Carter*, 1 Beav. 423; *Hill v. Gomme*, id. 540; *Underwood v. Hatton*, 5 Beav. 39; *Waller v. Barrett*, 24 Beav. 413.

<sup>3</sup> *Dornford v. Dornford*, 12 Ves. 129; *Raphael v. Boehm*, 13 Ves. 411, 490; *Moons v. De Bernales*, 1 Russ. 305; *Adair v. Shaw*, 1 Sch. & Lef. 272; *Montford v. Cadogan*, 17 Ves. 489; *Scurfield v. Howes*, 3 Bro. Ch. 90; *Att. Gen. v. Greenhouse*, 1 Bligh, N. R. 57.

<sup>4</sup> *Caffrey v. Darby*, 6 Ves. 496; *Cocker v. Quayle*, 1 R. & M. 535; *Fyler v. Fyler*, 3 Beav. 568; *Kellaway v. Johnson*, 5 Beav. 324; *Munch v. Cockerell*, 5 M. & C. 212; *Gibbons v. Taylor*, 22 Beav. 344; *State v. Fay*, 65 N. C. 265; *Dunn v. Dunn*, 1 S. C. 350; *Womack v. Austin*, id. 421; *Sanders v. Rogers*, id. 452.

<sup>5</sup> *Clough v. Bond*, 3 M. & C. 496.

<sup>6</sup> *Wiles v. Gresham*, 2 Dr. 258; *Dimes v. Scott*, 4 Russ. 195; *Fletcher v. Green*, 33 Beav. 426; *Palmer v. Jones*, 1 Vern. 144. Nor can a de-

imaginary or speculative values,<sup>1</sup> except in very gross cases of wilful default.<sup>2</sup> Where lands were sold in breach of trust, it was held in one case that their value at the time of filing the bill should be accounted for;<sup>3</sup> in other cases, their value at the time of the sale has been fixed upon as the sum to be accounted for.<sup>4</sup> But in no case will a trustee be held for more than he receives, if he is in no fault, and has committed no breach of the trust.<sup>5</sup>

§ 848. If cotrustees are jointly implicated in a breach of trust, the *cestui que trust* may have a *decree* against them jointly, but he may take an execution against any one of them separately,<sup>6</sup> or he may levy an execution on the property of one, as each one is liable for the whole amount;<sup>7</sup> but where a trustee accepted the trust on the condition that he should not be liable for more than he received, he was not held liable for a loss by his cotrustee.<sup>8</sup> (a) Although each

faulting trustee claim any part of the estate in his hands by demise or descent or otherwise, until he has made good all breaches of trust. *Jacobs v. Ryland*, L. R. 17 Eq. 341.

<sup>1</sup> *Harnard v. Webster*, Sel. Cas. Ch. 53.

<sup>2</sup> *Pybus v. Smith*, 1 Ves. Jr. 193; *Palmer v. Jones*, 1 Vern. 144.

<sup>3</sup> *Hart v. Ten Eyck*, 2 Johns. Ch. 62.

<sup>4</sup> *Norman v. Cunningham*, 5 Grat. 64; *Ames v. Downing*, 1 Bradf. 325; *Heth v. Richmond R. R. Co.*, 4 Grat. 482; *Johnson v. Lewis*, 2 Strob. Eq. 157; and see *Johnson v. Richey*, 4 How. (Miss.) 233; *Rainsford v. Rainsford*, Rice Eq. 369.

<sup>5</sup> *Staats v. Bingen*, 1 Vroom, 181.

<sup>6</sup> *Ex parte Shakeshaft*, 3 Bro. Ch. 197; *Walker v. Symonds*, 3 Swanst. 74; *Att. Gen. v. Wilson*, Cr. & Phil. 28; *Taylor v. Tabrum*, 6 Sim. 281; *Fletcher v. Green*, 33 Beav. 426; *Ex parte Angle*, Barn. 425; *In re Chertsey Market*, 6 Price, 278.

<sup>7</sup> *Wilson v. Moore*, 1 M. & K. 146; *Lyse v. Kingdom*, 1 Coll. 188; *Richardson v. Jenkins*, 1 Dr. 477; *Alleyne v. Darcy*, 4 Ir. Eq. 206; *Jenkins v. Robertson*, 1 Eq. R. 123; *Rehden v. Wesley*, 29 Beav. 215.

<sup>8</sup> *Birls v. Betty*, 6 Madd. 90.

(a) As between those appointed property, there is a primary and trustees and those who have become secondary liability as to breach of constructive trustees of the same trust, but they are all equally liable.

one may be compelled to pay the whole, yet if he pays the whole he may have contribution from the others who are

Cowper v. Stoneham, 68 L. T. 18; Fellrath v. Peoria G. S. Ass'n, 66 Ill. App. 77; Furman v. Rapelje, 67 id. 31.

Thus, if the negligence or connivance of one trustee enables his cotrustee to mismanage the trust property, both are equally liable, and the representatives of the second cannot require the beneficiary to first exhaust his claim against the property of the negligent trustee who was the first at fault. *Birmingham v. Wilcox*, 120 Cal. 467; *Re Niles*, 113 N. Y. 547; *Cocks v. Haviland*, 124 N. Y. 426. When one trustee's fault is greater than the other's, the first may be held primarily liable. *McCartin v. Traphagen*, 43 N. J. Eq. 323; see *Cowper v. Stoneham*, 68 L. T. 18; *In re Somerset*, 69 L. T. 744. If one trustee is unwillingly excluded by the cotrustee and beneficiaries from any voice in the management of the trust, he is not liable for the cotrustee's conduct. *In re Westerfield*, 53 N. Y. S. 25; *Meldon v. Devlin*, 45 id. 333. The relation of cotrustees to each other in respect to the trust funds is not that of debtor and creditor, or of surety for each other. *Ex parte Taylor*, 18 Q. B. D. 295; *Fesmire's Estate*, 134 Penn. St. 67.

A trustee may sue in equity, either with or without his beneficiary, to recover property lost through his cotrustee's breach of trust. *Clemens v. Heckscher*, 185 Penn. St. 476; *Birmingham v. Wilcox*, 120 Cal. 467.

Trustees will be protected in purchasing trust property from the *cestuis que trust* when the latter are competent to contract, and there is no fraud or concealment. *Mills v. Mills*, 63 Fed. Rep. 511; *Wildey v. Robinson*, 84 Hun, 362; *Saunders v. Richard*, 35 Fla. 28. The *cestui que trust* may authorize what would otherwise be a breach of trust or agree to hold the trustee harmless from such an act after it is done. *Pope v. Farnsworth*, 146 Mass. 339; *In re Champion*, 67 L. T. 344; 94 L. T. J. 57. The estate of a deceased trustee, who left the trust property properly invested at his death, is not liable for a subsequent breach of trust by his cotrustees. *Re Palk*, 41 W. R. 28; [1892] W. N. 112. A new trustee participating in his cotrustees' breach of trust is liable therefor with them. *Riker v. Alsop*, 27 F. R. 251.

Apart from statute, a married woman's separate estate appears not to be chargeable for her mere acquiescence in or approval of a breach of trust, but her husband may be liable therefor if he is only negligent and not guilty of active misconduct. *Sawyer v. Sawyer*, 28 Ch. D. 595, 605; *Bahin v. Hughes*, 31 Ch. D. 390.

In England, under the Judicial Trustees Act of 1896 (59 & 60 Vict. ch. 35), a trustee may now be relieved from personal liability for breach of trust in the discretion of the court, if it is satisfied upon the evidence that the trustee acted reasonably and honestly. *In re Turner*,

implicated in the breach of the trust;<sup>1</sup> (a) and if the one paying the whole has a legacy in his hands belonging to his cotrustee, he may hold the legacy by force of a lien upon it.<sup>2</sup> So if third persons have obtained all the benefit of a breach of the trust the trustees may recover from them the loss which has occurred to the trust property.<sup>3</sup> But if a *cestui que trust* has reaped all the profit of a breach of the trust, the trustees cannot compel *him* to refund,<sup>4</sup> although he might not

<sup>1</sup> Lockhart v. Reilly, 1 De G. & J. 464; Priestman v. Tindall, 24 Beav. 244; Lingard v. Bromley, 1 V. & B. 114; Tarleton v. Hornby, 1 Y. & Col. 336; Att. Gen. v. Wilson, Cr. & Phil. 28; Fletcher v. Green, 33 Beav. 513; Wilson v. Goodman, 4 Hare, 54; *Ex parte* Shakeshaft, 3 Bro. Ch. 198; Perry v. Knott, 4 Beav. 180; Att. Gen. v. Daugars, 33 Beav. 624; Coppard v. Allen, 2 De G., J. & S. 177; Knatchbull v. Fearnhead, 3 M. & C. 122; Pitt v. Bonner, 1 Y. & Col. Ch. 670; *Ex parte* Burton, 3 Mont. D. & De G. 373; Baynard v. Wolley, 20 Beav. 583.

<sup>2</sup> Birks v. Micklethwait, 33 Beav. 409.

<sup>3</sup> Trafford v. Boehm, 3 Atk. 440; Montford v. Cadogan, 17 Ves. 485; 19 Ves. 640; Birks v. Micklethwait, 33 Beav. 409; Greenwood v. Wakeford, 1 Beav. 580; Booth v. Booth, id. 125; Howe v. Dartmouth, 7 Ves. 150; Jacob v. Lucas, 1 Beav. 436; Lincoln v. Wright, 4 Beav. 432; Vaughn v. Vanderstegen, 2 Drew. 165, 363; Hobday v. Peters, 28 Beav. 354.

<sup>4</sup> Raby v. Ridelhalgh, 7 De G., M. & G. 108.

[1897] 1 Ch. 536; Perrins v. Bellamy, nature of a tort. See § 876 *infra*.  
[1899] 1 Ch. 797; *In re* Grindey, id. In Chillingworth v. Chambers,  
593; *In re* Kay, [1897] 2 Ch. 518; [1896] 1 Ch. 685, it was held that  
*In re* Stuart, id. 583; Bolton v. Curre, when a trustee, who has a beneficial  
[1895] 1 Ch. 544; Wynne v. Tempest, [1897] W. N. 43; *In re* Parker's interest in the fund, has concurred  
Will, 39 Ch. D. 303. He may act in the breach of trust, his share must  
unreasonably by an over-caution bear the loss, though his beneficial  
which causes expense to the *cestui* interest accrued to him after the  
*que trust*. *In re* Chapman, 72 L. T. breach of trust. Time does not  
66. A trustee's right to be indem- begin to run under the statute of  
nified for his expenditures in the limitations, in cases of contribu-  
the preservation of the trust fund tion, until the liability of one of  
is strictly limited to that fund. *In re* the parties is ascertained; this ap-  
Winchelsea's Policy Trusts, 39 Ch. plies equally to cotrustees and to  
D. 168. cosureties. Wolmershausen v. Gul-  
lick, [1893] 2 Ch. 514; Robinson v.  
Harkin, [1896] 2 Ch. 415.

(a) There is no contribution when the breach of trust is in the



himself be able to maintain a suit against the trustees for a breach of the trust. The decree for costs against cotrustees for breach of the trust is always joint,<sup>1</sup> and if one pays the entire cost, he may have an order in the same cause for contribution.<sup>2</sup>

§ 849. If the *cestui que trust* concur in the breach of the trust, he is estopped from proceeding against the trustee;<sup>3</sup> (a) a deed from a trustee with consent of a sole beneficiary *sui juris* carries title;<sup>4</sup> but he must know that the acts in which he concurs are a breach of the trust,<sup>5</sup> and he must be capable of acting for himself; as neither a *feme covert*<sup>6</sup> nor an infant<sup>7</sup>

<sup>1</sup> Lawrence v. Bowle, 2 Phil. 140; 1 C. P. Coop. t. Cott. 241.

<sup>2</sup> Pitt v. Bonner, 1 Y. & Col. Ch. 670.

<sup>3</sup> Brice v. Stokes, 11 Ves. 319; Walker v. Symonds, 3 Swanst. 64; Wilkinson v. Parry, 4 Russ. 272; Cocker v. Quayle, 1 R. & M. 534; Nail v. Punter, 5 Sim. 555; Newman v. Jones, Finch, 58; Fellows v. Mitchell, 1 P. Wms. 81; Booth v. Booth, 1 Beav. 125; Langford v. Gascoyne, 11 Ves. 336; White v. White, 5 Ves. 555; *In re* Chertsey Market, 6 Price, 280; Baker v. Carter, 1 Y. & Col. 255; Byrchall v. Bradford, 6 Madd. 13; Morley v. Hawke, cited Small v. Attwood, 2 Y. & J. 520; Fyler v. Fyler, 3 Beav. 550; Griffiths v. Porter, 25 Beav. 236; Life Asso. of Scotland v. Siddall, 3 De G., F. & J. 74; Smith v. French, 2 Atk. 243; Mayer v. Gould, 1 Atk. 615; Ryder v. Bickerton, 3 Swanst. 80, n.

<sup>4</sup> Dykes v. McVay, 67 Ga. 502.

<sup>5</sup> Buckeridge v. Glasse, Cr. & Phil. 135; Cope v. Clark, 18 W. R. 279.

<sup>6</sup> Walker v. Symonds, 3 Swanst. 80, and cases cited; Underwood v. Stevens, 1 Mer. 717; Parker v. White, 11 Ves. 221; Needler's Case, Hob. 225; Bateman v. Davis, 3 Madd. 98; Smith v. French, 2 Atk. 243; Montford v. Cadogan, 19 Ves. 639; Creswell v. Dewell, 4 Gif. 460; Vreeland v. Van Horn, 2 Green, 137; Smith v. French, 2 Atk. 243; Thayer v. Gould, 1 Atk. 615; Ryder v. French, 3 Swanst. 80, n.

<sup>7</sup> *Ante*, §§ 52-54.

(a) Keeping off the title all notice of the trust is not a misrepresentation that will displace the beneficiary's equitable title, though taken advantage of by a dishonest trustee to claim an absolute ownership. *Carritt v. Real & P. A. Co.*, 42 Ch. D. 263. In England, the discretion conferred upon the court to cause the trustee to be indemnified, by § 6 of the Trustee Act, 1888 (51 & 52 Vict. c. 59), is exercised when both the trustee and the instigating beneficiary are aware of the facts which constitute the breach of trust. *Griffith v. Hughes*, [1892] 3 Ch. 105.

can concur in a breach of trust, they having no authority to contract. If, however, a married woman or an infant, by a fraud, procure the breach of the trust, they will be estopped to proceed for such breach; for they have no privilege to commit frauds.<sup>1</sup> If a *cestui* fraudulently receives and converts trust property, a subsequently appointed trustee may retain out of the income afterward coming to the *cestui* the amount so converted.<sup>2</sup> A married woman may concur in a breach of trust in respect to estates settled to her separate use.<sup>3</sup> Where, however, her power of anticipation is restrained, she cannot concur in a breach of the trust.<sup>4</sup> And her concurrence will not operate beyond the interest settled to her separate use, although she may have a power of appointment.<sup>5</sup> The same observations apply to more formal acts by married women, such as releases, confirmations, and waivers of breaches of trust.<sup>6</sup> And a married woman cannot concur in a breach of trust before her interest falls into enjoyment, but a trustee will be liable for the whole fund, though it was lost by her procurement, before her interest fell into possession.<sup>7</sup>

§ 850. So a *cestui que trust* may be debarred from relief by long acquiescence in a breach of the trust, though he did not originally concur in it.<sup>8</sup> Beneficiaries who without objection

<sup>1</sup> *Ante*, § 53; *Davis v. Tingle*, 8 B. Mon. 359; *Hall v. Timmons*, 2 Rich. Eq. 120; *Stoolfoos v. Jenkins*, 12 S. & R. 399; *Wright v. Snowe*, 2 De G. & Sm. 320; *Wright v. Arnold*, 14 B. Mon. 643.

<sup>2</sup> *Crocker v. Dillon*, 133 Mass. 91, 102.

<sup>3</sup> *Ante*, § 669.

<sup>4</sup> *Ante*, §§ 669, 671.

<sup>5</sup> *Kellaway v. Johnson*, 5 Beav. 319; *Vaughn v. Vanderstegen*, 2 Dr. 165; *Blatchford v. Woolley*, 2 Dr. & Sm. 204; *Hobday v. Peters*, 28 Beav. 354; *Shattock v. Shattock*, L. R. 2 Eq. 182; *Brewer v. Swirley*, 2 Sm. & Gif. 219; *Fletcher v. Green*, 33 Beav. 426.

<sup>6</sup> *Jones v. Higgins*, L. R. 2 Eq. 598; *Smith v. French*, 2 Atk. 245; *Davies v. Hodgson*, 25 Beav. 187; *Derbishire v. Home*, 3 De G., M. & G. 80; *Wilton v. Hill*, 25 L. J. (N. S.) Ch. 156; *Clive v. Carew*, 1 John. & Hem. 205; *Rowley v. Unwin*, 2 Kay & John. 138.

<sup>7</sup> *Mora v. Manning*, 8 Ir. Eq. 218.

<sup>8</sup> *Harden v. Parsons*, 1 Ed. 145; *Villines v. Norfleet*, 2 Dev. Eq. 167. See *post*, Chap. XXVIII. *passim*.

have for years seen purchasers erecting valuable improvements on the trust property, are estopped from setting up title thereto.<sup>1</sup> If the *cestui que trust* neglects to sue for twenty years, it will be such *laches* that it will bar relief;<sup>2</sup> but a mere neglect to sue for a few years, without other acquiescence, is not a bar;<sup>3</sup> nor can a party sue until his interest falls into possession;<sup>4</sup> nor can any acquiescence be inferred until the *cestui que trust* has actual knowledge of the breach, for the reason that it is the duty of the trustee to execute the trust, and it is not the duty of the *cestui que trust* to make any inquiries.<sup>5</sup> So if the *cestui que trust* gets what he can from the wreck after a breach of the trust, and receives a part of what he is entitled to, he does not thereby waive his right to sue for the whole, when he can obtain it.<sup>6</sup>

§ 851. A *cestui que trust* may release a breach of trust by giving to the trustee a formal release, or a formal confirmation of the transaction.<sup>7</sup> A release of the principal in a breach of the trust is a release of all parties who would be liable secondarily, or as sureties.<sup>8</sup> So it is said that the *cestui que trust* may for a good consideration waive a breach

<sup>1</sup> Iverson v. Saulsbury, 65 Ga. 724.

<sup>2</sup> Bright v. Legerton, 29 Beav. 60; 2 De G., F. & J. 606; Hodgson v. Bibby, 32 Beav. 221; Browne v. Cross, 14 Beav. 105; Re McKenna, 13 Ir. Eq. 239; Clanricarde v. Henning, 30 Beav. 175; Scott v. Haddock, 11 Ga. 258; Obee v. Bishop, 1 De G., F. & J. 137.

<sup>3</sup> Hanchett v. Briscoe, 22 Beav. 496.

<sup>4</sup> Knight v. Bower, 2 De G. & J. 421, 443; Life Asso. of Scotland v. Siddall, 3 De G., F. & J. 72, 74, 77.

<sup>5</sup> Thompson v. Finch, 22 Beav. 325; 8 De G., M. & G. 560; Life Asso. of Scotland v. Siddall, 3 De G., F. & J. 73; Prevost v. Gratz, Pet. 66, 367; 6 Wheat. 487; Mellish's Est., 1 Pars. Eq. 486; Beeson v. Beeson, 9 Barr, 300.

<sup>6</sup> Thompson v. Finch, 22 Beav. 316; 8 De G., M. & G. 560.

<sup>7</sup> Blackwood v. Borrowes, 2 Con. & Laws. 459; French v. Hobson, 9 Ves. 103; Wilkinson v. Parry, 4 Russ. 272; Small v. Atwood, 2 Y. & J. 517, and cases cited; Cresswell v. Dewell, 4 Gif. 465; Pope v. Farnsworth, 146 Mass. 339, 344.

<sup>8</sup> Thompson v. Harrison, 2 Bro. Ch. 164; Blackwood v. Borrowes, 2 Con. & Laws. 478.

of the trust.<sup>1</sup> But all agreements or contracts between trustee and *cestui que trust* are looked upon with suspicion by the court, and are closely scrutinized; therefore in order that the release, confirmation, waiver, or acquiescence may have any effect, the *cestui que trust* must have full knowledge of all the facts and circumstances of the case;<sup>2</sup> he must also know the law, and what his rights are, and how they would be dealt with by the court.<sup>3</sup> He must not execute the release, or do the acts relied on as a waiver, confirmation, or acquiescence, under undue influence or fear of the trustee.<sup>4</sup> The *cestui que trust* must be *sui juris*, as an infant cannot be bound by a release or other act;<sup>5</sup> and if the *cestui que trust* has just come of age he ought to have proper legal advice.<sup>6</sup>

<sup>1</sup> Stackhouse v. Barnston, 10 Ves. 446.

<sup>2</sup> Adams v. Clifton, 1 Russ. 297; Walker v. Symonds, 3 Swanst. 1; Randall v. Errington, 10 Ves. 423; Buckridge v. Glasse, Cr. & Phil. 126; Bennett v. Colley, 2 M. & K. 232; Vyvyan v. Vyvyan, 30 Beav. 65; Eaves v. Hickson, id. 142; Farrant v. Blanchford, 1 De G., J. & S. 119; Life Asso. of Scotland v. Siddall, 3 De G., F. & J. 74; Strange v. Fooks, 4 Gif. 408; Chesterfield v. Janssen, 2 Ves. 146, 149, 152, 158; Roche v. O'Brien, 1 B. & B. 339, and cases cited; Bowes v. East London Water Works Co., 3 Madd. 375; McCarthy v. Decaix, 2 R. & M. 615; Wedderburn v. Wedderburn, 2 Keen, 722; 4 M. & C. 41; Munch v. Cockerell, 9 Sim. 339; 5 M. & C. 179; Broadhurst v. Balguy, 1 Y. & Col. Ch. 16; Downes v. Bullock, 25 Beav. 62; Lloyd v. Attwood, 3 De G. & J. 650; Berryhill's App., 35 Pa. St. 245; Ringgold v. Ringgold, 1 Har. & Gill, 11; Briers v. Hackney, 6 Ga. 419; Persch v. Quiggle, 57 Penn. St. 247; Shortel's App., 64 id. 25; Diller v. Brabaker, 52 id. 498; Campbell v. McLain, 51 id. 200; Maul v. Rider, id. 377; Jones v. Lloyd, 117 Ill. 597.

<sup>3</sup> Cockerell v. Cholmeley, 1 R. & M. 425; McCarthy v. Decaix, 2 R. & M. 615; Marker v. Marker, 9 Hare, 16; Burrows v. Walls, 5 De G., M. & G. 254; *Re Saxon Life Ins. Co.*, 2 John. & Hem. 412; Strange v. Fooks, 4 Gif. 408; Stafford v. Stafford, 1 De G. & J. 202.

<sup>4</sup> Bowles v. Stewart, 1 Sch. & Lef. 209; Chesterfield v. Janssen, 2 Ves. 149, 158.

<sup>5</sup> Walker v. Symonds, 3 Swanst. 69; Hicks v. Hicks, 3 Atk. 274; Osmond v. Fitzroy, 3 P. Wms. 131; Hylton v. Hylton, 2 Ves. 547; Kilby v. Sneyd, 2 Moll. 233; March v. Russell, 3 M. & C. 42, 44; Bateman v. Davis, 3 Madd. 98; Wedderburn v. Wedderburn, 2 Keen, 722; 4 M. & C. 41; Kay v. Smith, 21 Beav. 522; Aveline v. Melhuish, 2 De G., J. & Sm. 288; Chambers v. Crabbe, 34 Beav. 457.

<sup>6</sup> Lloyd v. Attwood, 3 De G. & J. 615; Elliott v. Elliott, 5 Benn. 8;

§ 852. So a breach of trust may be discharged by the will of the *cestui que trust* entitled to the fund; and a legacy may be a satisfaction of the breach. So the acceptance of a part of the purchase-money by the *cestui que trust* may be a confirmation of a sale made in breach of the trust.<sup>1</sup>

§ 853. Of course, no one not interested as a beneficiary can release or waive a breach of the trust.<sup>2</sup> When creditors have a right to come in and claim an account, or to have conveyances set aside, it is on the ground that the law gives them a right and interest to secure the property to pay the debts due to them.<sup>3</sup>

Say *v.* Barnes, 4 S. & R. 14; Luken's App., 7 W. & S. 48; Stanley's App., 8 Penn. St. 431; Williams *v.* Powell, 1 Ired. Eq. 460; Johnson *v.* Johnson, 2 Hill, Eq. 277; Brewer *v.* Vanarsdale, 6 Dana, 204; Fish *v.* Miller, 1 Hoff. 267; Waller *v.* Armistead, 2 Leigh, 11; Kirby *v.* Taylor, 6 Johns. Ch. 242.

<sup>1</sup> Stump *v.* Gaby, 2 De G., M. & G. 623; Bensusan *v.* Nehemias, 20 L. J. Ch. 536; 4 De G. & Sm. 381; Rosenberger's App., 26 Penn. St. 67; *ante*, § 202.

<sup>2</sup> Wilson *v.* Troup, 2 Cow. 195; Beeson *v.* Beeson, 9 Penn. St. 279. A breach of trust by a trustee for a sinking fund of a corporation in investing funds cannot be condoned by the board of directors. North Carolina R. R. Co. *v.* Wilson, 81 N. C. 223.

<sup>3</sup> Bruch *v.* Lantz, 2 Rawle, 392; Iddings *v.* Bruen, 4 Sand. Ch. 223.

## CHAPTER XXVIII.

THE STATUTE OF LIMITATIONS, LAPSE OF TIME, AND PUBLIC  
POLICY AS AFFECTING TRUSTS.

- § 854. Three bars in equity.
- § 855. The statute bar at law and in equity the same.
- § 856. When the statute begins to run.
- § 857. The statute an absolute bar where it applies.
- §§ 858, 859. Whether the *cestui que trust* is barred by the neglect of the trustee.
- § 859 a. Whether the act of the trustee prevents the running of the statute in favor of the *cestui*.
- § 860. Where the trustee conveys to a third person in breach of the trust.
- § 861. Where there is fraud.
- § 862. How the statute bar may be taken advantage of.
- § 863. The statute bar as between trustee and *cestui que trust*.
- § 864. When the statute will begin to run as between trustee and *cestui que trust*.
- § 865. Whether the statute applies to constructive trusts.
- § 866. What acts will be presumed to have been done after a great length of time.
- § 867. When a person is ignorant of his rights.
- § 868. How lapse of time may be taken advantage of.
- § 869. Where public policy is a bar to the litigation of old and stale claims.
- § 870. Where acquiescence may bar a right or claim.
- §§ 871, 872. How far back accounts for *mesne* profits will be ordered.

§ 854. THERE are three bars to claims or suits in equity arising from lapse of time: I. The statute of limitations; II. The presumption of something done, which, if done, is an answer to the plaintiff's suit; III. Public policy, which forbids the litigation of old and stale demands. These matters may be examined: (1) As between the trustee and *cestui que trust* on the one side, and a stranger on the other; and (2) as between the trustee and *cestui que trust*.

§ 855. Where there is a statute bar at *law*, the same period, in analogy or obedience to the statute, is adopted in

equity as a bar to equitable claims. (a) Lord Camden said: "A court of equity has no legislative authority, and it cannot properly define the time of bar by a positive rule, to an hour, minute, or year: it is governed by circumstances. But as often as Parliament has limited the time of actions and remedies to a certain period in legal proceedings, chancery has adopted that rule and applied it to similar cases in equity; for when the legislature has fixed a time at law, it would be preposterous for equity, which by its proper authority always maintained a limitation, to countenance *laches* beyond the period allowed by law. Therefore, in all cases, where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar."<sup>1</sup> Lord Redesdale was of opinion, "that the statute virtually included courts of equity, and that it was a mistake to say that equity acts in *analogy* to the statute: it acts in *obedience* to it. Equity follows the law."<sup>2</sup> The same opinion has been held by other great judges in England<sup>3</sup> and America.<sup>4</sup>

<sup>1</sup> Smith v. Clay, cited in Deloraine v. Browne, 3 Bro. Ch. 639. See Love v. Love, 65 Ala. 555.

<sup>2</sup> Hovenden v. Annesley, 2 Sch. & Lef. 630.

<sup>3</sup> Cholmondeley v. Clinton, 2 J. & W. 192; Bond v. Hopkins, 1 Sch. & Lef. 429; Medlicott v. O'Donel, 1 B. & B. 166; Foley v. Hill, 1 Phil. 405; *Ex parte* Dewdney, 15 Ves. 496; Clanricarde v. Henning, 30 Beav. 175; Att. Gen. v. Exeter, Jac. 448; Knowles v. Spence, 1 Eq. Cas. Ab. 315; Hamilton v. Grant, 3 Dow. 44; Townshend v. Townshend, 1 Bro. Ch. 554; Salter v. Cavanagh, 1 Dr. & W. 668; Bonney v. Ridgard, 1 Cox, 149; Pearson v. Pulley, 1 Ch. Cas. 102; Beckford v. Wade, 17 Ves. 97; White v. Ewer, 2 Vent. 340; Kingston v. Lorton, 2 Hog. 166; Johnson v. Smith, 2 Burr. 961; Aggas v. Pickerell, 3 Atk. 225; Belch v. Harvey, App. to Sugd. V. & P. (13th ed.).

<sup>4</sup> Bowman v. Wathen, 2 McLean, 376; 1 How. 189; Chapman v.

(a) See Abraham v. Ordway, 158 82 Va. 383; McCarty v. Ball, id. U. S. 416; Blue v. Everett, 56 N. J. 872; Barnett v. Barnett, 83 Va. 504. Eq. 455; Kelley v. Boettcher, 85 When the remedies at law and in F. R. 55; Hubbard v. Manhattan equity are concurrent, if the legal Trust Co., 87 id. 51; Reynolds v. remedy is barred, the remedy in Sumner, 126 Ill. 58; Gillette v. equity is barred also. Smith v. Wiley, id. 310; Gibboney v. Kent, Wood, 42 N. J. Eq. 563.

§ 856. Upon these principles, an equitable claim to lands cannot be enforced after the lapse of twenty years; for although writs of *right* may be brought after a longer period, yet this has always been looked upon as an exception to the general rule.<sup>1</sup> At *law*, the statute time does not begin to run against a remainder-man until the determination of the particular estate,<sup>2</sup> except in the case of a mortgage. (a) If a mortgagee enters to foreclose, the time will run against the remainder-man, although the tenant for life is in possession, on the ground that the remainder-man, though out of possession, may have a bill to redeem.<sup>3</sup> But if the mortgagee is also tenant for life, the time does not begin to run until his

Butler, 22 Mo. 19; Phillips v. Rogers, 12 Met. 405; Bank of U. S. v. Daniel, 12 Pet. 56; Dodge v. Essex Ins. Co., 12 Gray, 71; Farnam v. Brooks, 9 Pick. 212; Kane v. Bloodgood, 7 Johns. Ch. 90; Robinson v. Hook, 4 Mason, 139; Miller v. McIntire, 6 Pet. 61; Baker v. Biddle, Baldw. 419; Hawkins v. Barney, 5 Pet. 457; Coulson v. Walton, 9 id. 62; Boone v. Chiles, 10 id. 177; Elsmendorf v. Taylor, 10 Wheat. 152; Piatt v. Vattier, 1 McLean, 16; 9 Pet. 416; People v. Everest, 4 Hill, 71; Michoud v. Girod, 4 How. 591; Taylor v. Benham, 5 How. 253; Lawrence v. Trustees, &c., 2 Denio, 577; Bruen v. Hone, 2 Barb. 586; McCarter v. Cornel, 1 Barb. Ch. 233; Perkins v. Cartwell, 4 Har. (Del.) 270; Manchester v. Mathewson, 3 R. I. 237; Dean v. Dean, 1 Stockt. 425; McCrea v. Piermont, 16 Wend. 460; Humbert v. Trinity Church, 24 Wend. 587; 7 Paige, 195; Hayden v. Bucklin, 9 Paige, 512; Saunders v. Collin, 1 Dev. & Bat. 95; Ridley v. Hetman, 10 Ohio, 524; Long v. White, 5 J. J. Marsh. 231; Reeves v. Dougherty, 7 Yerg. 222; Tiernan v. Rescaniere, 10 Gill. & J. 218; Paff v. Kinney, 1 Bradf. 1; Lorman v. Clarke, 2 McLean, 273; Demarest v. Wynkoop, 3 Johns. Ch. 129; Barnes v. Taylor, 27 N. J. Eq. 265.

<sup>1</sup> Cholmondeley v. Clinton, 2 J. & W. 192.

<sup>2</sup> Gen. Stat. of Mass. c. 154, § 3; Wells v. Prince, 9 Mass. 508; Wallingford v. Heard, 15 Mass. 471; Bacon v. McIntire, 8 Met. 89.

<sup>3</sup> Gifford v. Hort, 1 Sch. & Lef. 407; Blake v. Foster, 4 Bligh (N. S.), 407; Corbett v. Barker, 1 Anstr. 138; 3 Anstr. 755; Harrison v. Hollins, 1 S. & S. 491; 2 Phil. 121.

(a) See Matson v. Abbey, 141 Ark. 70; Anderson v. Northrop, 30 N. Y. 179; Young v. Young, 21 Fla. 612; Allen v. De Groodt, 98 N. Y. S. 1008; Lamar v. Pearre, 82 Mo. 159; 14 Am. St. Rep. 626, and Ga. 354; Chambers v. Chambers, note. 139 Ind. 111; Ogden v. Ogden, 60



death;<sup>1</sup> and so if the mortgagee is tenant in common with others of the equity of redemption.<sup>2</sup>

§ 857. The statute bar is absolute where it applies, and no allegations of poverty, ignorance, hardship, or mistake can avoid it. If courts allowed the rules of law, or periods of time, to be controlled by such considerations, there would be no end to litigation, and no certain rules of property.<sup>3</sup>

§ 858. It was said in one case, that "forbearance of the trustees, in not doing what it was their office to have done, should in no sort prejudice the *cestui que trust*;"<sup>4</sup> that is, that if the trustee does not bring an action to recover the estate within the statutory period, the *cestui que trust* is not barred. But this is not the rule of law. Lord Hardwicke said: "The rule that the statute of limitations does not bar a trust estate holds only between *cestui que trust* and trustee, not as between *cestui que trust* and trustee on one side, and *strangers* on the other; for that would make the statute of no force at all, because there is hardly any estate of consequence without such trust, and so the act would never take place. Therefore, where the *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both."<sup>5</sup> Lord Redesdale and Lord Manners made similar observations and decisions.<sup>6</sup>

<sup>1</sup> Raffety v. King, 1 Keen, 601; Burrell v. Egremont, 7 Beav. 205.

<sup>2</sup> Wynne v. Styan, 2 Phil. 205.

<sup>3</sup> Cholmondeley v. Clinton, 2 J. & W. 139; Brooksbank v. Smith, 2 Y. & Col. 58; Byrne v. Frere, 2 Moll. 171; Hovenden v. Annesley, 2 Sch. & Lef. 640.

<sup>4</sup> Lechmere v. Carlisle, 3 P. Wms. 215.

<sup>5</sup> Llewellyn v. Mackworth, 3 Eq. Cas. Ab. 579; Barn. 446; Crowther v. Crowther, 23 Beav. 305; Herndon v. Pratt, 6 Jones, Eq. 327; Fleming v. Gilmer, 35 Ala. 62; Mason v. Mason, 33 Ga. 435; Watkins v. Specht, 7 Coldw. 585; Crook v. Glen, 30 Md. 55; Love v. Love, 65 Ala. 555.

<sup>6</sup> Hovenden v. Annesley, 2 Sch. & Lef. 629; Pentland v. Stokes, 2 B. & B. 75; Allen v. Sayer, 2 Vern. 368; Lewin, 625; Wych v. East India Co., 3 P. Wms. 309; Earl v. Huntingdon, id.; Thomas v. Thomas, 2 K. & J. 79; Goss v. Singleton, 2 Head, 67; Belote v. White, id. 703; Maddox v. Allen, 1 Met. (Ky.) 495.

But it would seem, that, if the *cestui que trust* is entitled to an interest in remainder only, the statutory bar ought not to begin to run against him until his interest falls into a right to the possession of the beneficial or equitable interest.<sup>1</sup> Where the trustee is barred so is the *cestui*.<sup>2</sup> (*a*)

§ 859. If the subject-matter of the trust is a debt due the trustee for his *cestui que trust*, the statute runs against it. In such case there is no right to sue in equity. The *cestui que trust* has the right to use the name of the trustee in an action at law to recover the debt. But the legal limitation cannot be avoided by changing the tribunal.<sup>3</sup> It is said, however, that, if the debtor borrowed the money, knowing it to be trust money, especially if he borrowed it in breach of the trust, he becomes so far affected by the equities of the trust that he holds it as a trustee, and he cannot set up the statute as a bar against the rights of the *cestui que trust*.<sup>4</sup>

§ 859 *a.* A part payment by a trustee, who has authority to sell certain property and apply the proceeds to the settlement of debts, will not take the residue of the debt out of the statute as against the *cestui*.<sup>5</sup> This can only be done by one having authority to make a new promise for the debtor.

<sup>1</sup> *Parker v. Hall*, 2 Head, 641.

<sup>2</sup> *Smith v. Gillam*, 80 Ala. 296; *Varner v. Gunn*, 61 Ga. 54; *Ford v. Cook*, 73 Ga. 215; *Knorr v. Raymond*, id. 749; *Clayton v. Cagle*, 97 N. C. 300; *Waring v. C. & D. R. Co.*, 16 S. C. 417.

<sup>3</sup> *Hammond v. Messenger*, 9 Sim. 327; *Bolton v. Powell*, 14 Beav. 275; *Wych v. East India Co.*, 3 P. Wms. 309; *Mason v. Mason*, 33 Ga. 435.

<sup>4</sup> *Spickernell v. Hotham*, Kay, 669; *Bridgman v. Gill*, 24 Beav. 302; *Ernest v. Croysdill*, 6 Jur. (N. S.) 740; *Upham v. Wyman*, 7 Allen, 499; *Sheridan v. Joyce*, 7 Ir. Eq. 115.

<sup>5</sup> *Leach v. Asher*, 20 Mo. App. 659.

(*a*) 1 Ames on Trusts (2d ed.), 271. 68 Tex. 150; *Willson v. Louisville Trust Co. (Ky.)*, 44 S. W. 121; *Barclay v. Goodloe*, 83 Ky. 493; *Ewing v. Shannahan*, *Crawley v. Richardson*, 78 Ga. 213; 113 Mo. 188; *Collins v. McCarty*, *infra*, § 865, n. (*a*).

§ 860. If a trustee, in breach of his trust, conveys the land to a third person, such third person, if he is an innocent purchaser for value without notice, will hold the estate discharged of the trust. But if he received the conveyance with notice, or without paying any consideration, he will be holden as a trustee; for the *cestui que trust* may enforce the trust against him by proceeding in equity. Whether the *cestui que trust* can bring such bill after the lapse of twenty years without claim, or after the trustee is barred from maintaining a real action, is a serious question. It may be said, that the relation between such holder of the legal title and the *cestui que trust* is that of trustee and *cestui que trust*, and that the same principles apply, respecting the application of the statute, as apply between the trustee and *cestui que trust* in an express trust. But on the other hand, such holder of the legal title is not a trustee, except by construction of law, and until a decree of the court is had; and if he has denied the trust for more than twenty years and held adversely, there would seem to be no reason why equitable as well as legal rights should not be barred.<sup>1</sup> (a) But, in these cases, the rights of the *cestui que trust* cannot be barred until his rights fall into possession. If, therefore, the *cestui que trust* holds only<sup>2</sup> in remainder or reversion, the statute will not begin to run until his right to the possession falls in by the determination of the particular estate. So if the

<sup>1</sup> Merriam v. Hassam, 14 Allen, 520; Milling v. Leak, 32 Eng. L. & Eq. 442; Att. Gen. v. Federal St. Meeting-House, 3 Gray, 1; Williams v. First Presby. Soc., 1 Ohio St. 478; Johnson v. Prairie, 91 N. C. 163.

<sup>2</sup> McCoy v. Poor, 56 Md. 197.

(a) See Miles v. Thorne (38 Cal. 335), 99 Am. Dec. 384, 398; Duckett v. Nat. M. Bank, 86 Md. 400; Neal v. Bleckley, 51 S. C. 506. trustees. Jenkins v. Hammer-schlag, 56 N. Y. S. 534, 537. See Kittel's Estate, 156 Penn. St. 445.

When the trust is of indefinite duration for the benefit of the beneficiary, he is not guilty of laches in not determining it. Gutch v. Fost-dick, 48 N. J. Eq. 353, 358.

*cestui que trust* is under disability, the statute will not begin to run until the disability is removed.<sup>1</sup>

§ 861. No time will protect a fraud so long as it is concealed; therefore, until a fraud is discovered, or could have been discovered by ordinary diligence,<sup>2</sup> the statute does not begin to run; for no cause of action exists within the knowledge of the party entitled to the action.<sup>3</sup> (a) But as soon as

<sup>1</sup> *Thompson v. Simpson*, 1 Dr. & War. 489; *Att. Gen. v. Magdalen College*, 18 Beav. 239; 6 H. L. Cas. 215; *Life Asso. of Scotland v. Siddall*, 3 De G., F. & J. 58; *Price's App.*, 54 Penn. St. 472.

<sup>2</sup> *McCoy v. Poor*, 56 Md. 197.

<sup>3</sup> *Blair v. Bromley*, 2 Phil. 354; *Booth v. Warrington*, 4 Bro. P. C. 163; *Alden v. Gregory*, 2 Ed. 280; *Cotterell v. Purchase*, Cas. t. Talb. 63; *Arran v. Tyrawley*, cited 1 B. & B. 106; *Rolf v. Gregory*, 11 Jur. (N. S.) 97; 4 De G., J. & S. 576; *Medlicott v. O'Donel*, 1 B. & B. 166; *Morse v. Royal*, 12 Ves. 374; *Ricknell v. Gouch*, 3 Atk. 558; *South Sea Co. v. Wymondsell*, 3 P. Wms. 143; *Hovenden v. Annesley*, 2 Sch. & Lef. 634; *Pickering v. Stamford*, 2 Ves. Jr. 280; *Robertson v. Norris*, 1 Gif. 421; *Western v. Cartwright*, Sel. Cas. Ch. 34; *Blennerhassett v. Day*, 2 B. & B. 118; *Roche v. O'Brien*, 1 id. 330; *Watson v. Toone*, 5 Madd. 54; *Whalley v. Whalley*, 1 Mer. 436; *Pilcher v. Flinn*, 30 Ind. 202; *Carr v. Hilton*, 1 Curtis, C. C. 390; *Martin v. Smith*, 1 Dillon, 95.

(a) Equity will not usually lend its aid to establish or enforce a stale trust; and when there has been great delay in bringing suit, even though the trustee has fraudulently concealed the facts from the beneficiary, the latter must definitely set forth in his bill the cause of his ignorance, the impediments to an earlier prosecution of his claim, the means used by the trustee to mislead him, and how and when he acquired a knowledge of his rights. *Kilbourn v. Sunderland*, 130 U. S. 505; *Hammond v. Hopkins*, 143 U. S. 224; *Felix v. Patrick*, 145 U. S. 317; *Bates v. Preble*, 151 U. S. 149; *Whitney v. Fox*, 166 U. S. 637; *McIntire v. Prior*, 173 U. S. 38; *McMonagle v. McGlinn*, 85 F. R. 88; *Farrand v. Land Co.*, 86 id. 393; *Curtis v. Lakin*, 94 id. 251; *Reorganized Church v. Church of Christ*, 60 id. 937; *Irish v. Antioch College*, 126 Ill. 474; *Wood v. Williams*, 142 Ill. 269; *Conn. Mut. Life Ins. Co. v. Smith*, 117 Mo. 261; *Wolcott v. Wilsey*, 141 Mo. 200; *Reynolds v. Hennessy*, 17 R. I. 169; *Tillison v. Ewing*, 91 Ala. 467; *Jackson v. Jackson*, 149 Ind. 238; *Lindsley v. Dodd*, 53 N. J. Eq. 69; *In re Page*, [1893] 1 Ch. 304; *In re Gurney*, id. 590; *Teall v. Slaven*, 14 Sawyer, 364; *Lane v. Lane*, 87 Ga. 268; *Re Postlethwaite*, 60 L. T. 514; *Re Somerset*, 69 id. 744; *State v. Standard Oil Co.*, 49 Ohio St.

the fraud is known, the statute begins to run, and the defendant has a right to say that the matter cannot be brought under discussion at so late a period; that it is the plaintiff's own fault if he delays for more than twenty years after the fraud is known.<sup>1</sup> In one case, it was said that the statute would run from the date of the fraud, provided the party had notice of it within a reasonable time during which to bring his action before the expiration of the twenty years.<sup>2</sup> But the general rule is, that the time does not begin to run until the fraud is known.<sup>3</sup>

§ 862. The statute is so clear a defence, that the defendant may demur<sup>4</sup> whenever the facts appear upon the face of the bill; if they do not, he may set them forth in a plea,<sup>5</sup> or in his answer, and pray the same benefit as if he had de-

<sup>1</sup> *Hovenden v. Annesley*, 2 Sch. & Lef. 634; *Western v. Cartwright*, Sel. Cas. Ch. 34; *Mulcahy v. Kennedy*, 1 Ridg. 337.

<sup>2</sup> *Byrne v. Frere*, 2 Moll. 137; *Relf v. Eberly*, 23 Iowa, 467.

<sup>3</sup> *Hieronymous v. Mayhall*, 1 Bush. 508; *Townsend v. Townsend*, 4 Cold. 70; *Relf v. Eberly*, 23 Iowa, 467; *Baldwin v. Tuttle*, id. 66; *McCarthy v. Kyle*, 4 Cold. 348; *Hoyle v. Jones*, 35 Ga. 40; *Boyd v. Boyd*, 27 Ind. 429; *Curry v. Allen*, 36 Cal. 254.

<sup>4</sup> *Foster v. Hodgson*, 19 Ves. 180; *Bampton v. Birchall*, 5 Beav. 67; *Hoare v. Peck*, 6 Sim. 51; *Hovenden v. Annesley* 2 Sch & Lef. 637; *Aggas v. Pickerell*, 3 Atk. 225; *Hodle v. Healey*, 1 V. & B. 539; *Beckford v. Close*, cited 6 Sim. 184; *Hardy v. Reeves*, 4 Ves. 479; *Pearson v. Pulley*, 1 Ch. Ca. 102; *Frazer v. Moor*, Bunb. 54; *Prance v. Sympson*, Kay, 680; *Ferguson v. Livingston*, 9 Ir. Eq. 202; *Fyson v. Pole*, 3 Y. & Col. 266; *Cook v. Arnham*, 3 P. Wms. 287, and cases cited. *Deloraine v. Browne*, 3 Bro. Ch. 635, is inconsistent. And see *O'Kelly v. Glenny*, 9 Ir. Eq. 25.

<sup>5</sup> *Aggas v. Pickerell*, 3 Atk. 225; *Blewitt v. Thomas*, 2 Ves. Jr. 669; *Wych v. East India Co.*, 3 P. Wms. 309; *Walford v. Liddel*, 2 Ves. 400; *Lacon v. Lacon*, 2 Atk. 395.

137; *Chicago, &c. Ry. Co. v. Titterton*, 84 Texas, 218; *Sanchez v. Dow*, 23 Fla. 445; *Hudson v. Kimbrough*, 74 Miss. 331; *Straut's Estate*, 126 N. Y. 201.

Although the statute of limitations will not run in cases of fraud

or concealment in relation to a resulting or constructive trust, yet it must be the fraud of, or in some way imputable to, the person who pleads the statute. *Thorne v. Heard*, [1895] A. C. 495.

murred, or pleaded the statute.<sup>1</sup> If the defendant does not do one of these things, he can have no benefit from the statute at the hearing;<sup>2</sup> though it is said that the court may in its discretion refuse relief after the limited period.<sup>3</sup> (a) If the bill contains charges of fraud, the defendant may demur<sup>4</sup> or plead,<sup>5</sup> according as the facts and circumstances appear upon the face of the bill. But if the plaintiff alleges that he did not discover the fraud within the period limited by the statute, the defendant must in his plea or answer either deny the fraud or allege that the plaintiff had knowledge.<sup>6</sup>

§ 863. As between trustee and *cestui que trust*, in the case of an express trust, the statute of limitations has no application, and no length of time is a bar.<sup>7</sup> (b) Against an express

<sup>1</sup> Barber v. Barber, 18 Ves. 286.

<sup>2</sup> Prince v. Heylin, 1 Atk. 494; Harrison v. Boswell, 10 Sim. 382; Roch v. Callen, 6 Hare, 535; Sleight v. Lawson, 3 K. & J. 296.

<sup>3</sup> Prince v. Heylin, 1 Atk. 494.

<sup>4</sup> Hovenden v. Annesley, 2 Sch. & Lef. 637, in which Deloraine v. Browne, 3 Bro. Ch. 633, is commented upon; Hoare v. Peck, 6 Sim. 51.

<sup>5</sup> South Sea Co. v. Wymondsell, 3 P. Wms. 143.

<sup>6</sup> Mitford on Plead., 269; Story, Eq. Plead., §§ 503-506.

<sup>7</sup> Chalmer v. Bradley, 1 J. & W. 27; Harston v. Tenison, 20 Ch. D. 109; Llewellyn v. Mackworth, Barn. 449; Townshend v. Townshend, 1

(a) In the Federal courts, when long and unexplained acquiescence appears upon the face of the bill, the court of its own motion may decline to consider the case, though there is no demurrer or formal plea of laches or limitation. Badger v. Badger, 2 Wall. 87; 2 Cliff. 137, 154; Sullivan v. Portland R. Co., 94 U. S. 806; Taylor v. Holmes, 127 U. S. 489; Norris v. Haggin, 136 U. S. 386; 28 F. R. 275.

(b) "If there is created in expressed terms, whether written or verbal, a trust, and a person is in terms nominated to be the trustee of that trust, a court of equity,

upon proof of such facts, will not allow him to vouch a statute of limitations against a breach of that trust. Such a trust is in equity called an express trust. If the only relation which it is proved the defendant or person charged bears to the matter is a contractual relation, he is not in the view of equity a trustee at all, but only a contractor; and equity leaves the contractual relation to be determined by the common or statute law. If the breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of a court of equity, the

and continuing trust time does not run until repudiation or adverse possession by the trustee and knowledge thereof on

Bro. Ch. 554; *Hollis's Case*, 2 Vent. 345; *Hargreaves v. Michell*, 6 Madd. 326; *Massey v. O'Dell*, 10 Ir. Eq. 22; *Shields v. Atkins*, 3 Atk. 563;

defendant a trustee for the plaintiff, the court of equity treats the defendant as a trustee become so by construction, and the trust is called a constructive trust; and against the breach which by construction creates the trust the court of equity allows statutes of limitation to be vouched." Per Lord Esher, M. R., in *Soar v. Ashwell*, [1893] 2 Q. B. 390, 393. See *Wassell v. Leggatt*, [1896] 1 Ch. 554; *How v. Winterton*, 2 id. 626; *In re Lands Allotment Co.* [1894] 1 Ch. 616; *In re Swain*, [1891] 3 Ch. 233; *In re Bowden*, 45 Ch. D. 444; *In re Rowe*, 61 L. T. 581.

In cases of constructive trusts, relief must be sought within a reasonable time. *Beckford v. Wade*, 17 Ves. 88; *Hendrickson v. Hendrickson*, 42 N. J. Eq. 657; *Le Gendre v. Byrnes*, 44 id. 372; *Riddle Whitehill*, 135 U. S. 621, 634.

In *Ewers v. White's Estate*, 114 Mich. 266, it was held that, in the case of an agent, the statute does not begin to run until the principal demands payment. See also *Grant v. Odiorne*, 43 Ill. App. 402; *Hasher v. Hasher* (Va.), 32 S. E. 41; *Sanborn v. Plowman* (Texas), 49 S. W. 639; *Lyell v. Kennedy*, 14 A. C. 437. In the case of an attorney at law collecting money, the statute runs, by the weight of authority, against the client from the time the latter knows that the funds have been received by him. *Douglas v.*

*Corry*, 46 Ohio St. 349; *McCain v. Peart*, 145 Penn. St. 516; *Johnston v. McCain*, id. 531; *Schofield v. Wolley*, 98 Ga. 548; *Wilder v. Secor*, 72 Iowa, 161; *Roberts v. Armstrong*, 1 Bush, 263; *Leigh v. Evans*, 64 Ark. 26; *McDowell v. Potter* (Penn.), 49 Am. Dec. 503.

The statute of limitations does not begin running against a surety suing a cosurety for contribution until the liability of the surety is established; and this rule applies also to a trustee claiming contribution against his cotrustee in respect of a liability incurred from loss caused by their joint default, in which case time does not begin to run as between the cotrustees until the claim of the beneficiaries has been established against one of them. *Wolmershausen v. Gullick*, [1893] 2 Ch. 514; *Robinson v. Harkin*, [1896] 2 Ch. 415; *Stone v. Hammell*, 83 Cal. 547; *Martin v. Frantz*, 127 Penn. St. 389. The statute runs in favor of the surety though his principal is absent from the State. *Mozingo v. Ross*, 150 Ind. 688. See *Berkin v. Marsh*, 18 Mont. 152.

A debtor's promise to pay his creditor out of his property, or out of a designated part thereof, does not so create a trust therein as to allow the creditor's claim, when barred, to be enforced against the property. *Hamilton v. Downer*, 152

the part of the *cestui*.<sup>1</sup> (a) Such a trust is only barred on the

Heath *v.* Henly, 1 Ch. Cas. 26; Wedderburn *v.* Wedderburn, 2 Keen, 749; 2 My. & C. 41; 22 Beav. 84; Pomfret *v.* Winsor, 2 Ves. 484; Bennett *v.* Colley, 2 My. & K. 232; Wilson *v.* Moore, 1 My. & K. 146; Hammond *v.* Hicks, 1 Vern. 432; Smith *v.* Acton, 26 Beav. 210; Bell *v.* Bell, Ll. & G. t. Plunk. 66; Butler *v.* Carter, L. R. 5 Eq. 276; Brittlebank *v.* Goodwin, id. 545; Blair *v.* Nugent, 9 Ir. Eq. 400; Lawton *v.* Ford, L. R. 2 Eq. 97; Phillipo *v.* Munnings, 2 My. & C. 309; Gough *v.* Bult, 16 Sim. 323; Norton *v.* Turville, 2 P. Wms. 144; Att. Gen. *v.* Exeter, Jac. 448; Navarre *v.* Rutton, 1 Vin. Ab. 185; Ward *v.* Arch, 12 Sim. 472; Young *v.* Waterpark, 13 Sim. 204; Sheldon *v.* Wildman, 2 Ch. Ca. 26; Hardwick *v.* Vernon, 4 Ves. 411; 14 Ves. 501; Ormond *v.* Hutchinson, 13 Ves. 47; Chedworth *v.* Edwards, 8 Ves. 46; McDonald *v.* McDonald, 1 Bligh, 315; Makepeace *v.* Rogers, 11 Jur. (n. s.) 215; Leed *v.* Beene, 23 L. T. Rep. 26; Beckford *v.* Wade, 17 Ves. 97; Decouche *v.* Savetier,

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<sup>1</sup> Hastie & Silver *v.* Aiken, 67 Ala. 316; Whetstone *v.* Whetstone's Ex'rs, 75 Ala. 496; Janes *v.* Throckmorton, 57 Cal. 368; Pace *v.* Payne, 73 Ga. 670; McCallam *v.* Carswell, 75 id. 25; Russell *v.* Peyton, 4 Brad. (Ill.) 473; Walden *v.* Karr, 88 Ill. 49; Helm's Ex'r *v.* Rogers, 81 Ky. 568; Haskell *v.* Hervey, 74 Maine, 192; Price *v.* Mulford, 36 Hun, 247; University *v.* Bank, 96 N. C. 280; Carpenter *v.* Canal Co., 35 Ohio St. 317; Bostwick *v.* Estate of Dickson, 65 Wis. 593; Bacon *v.* Rives, 106 U. S. 99.

Ill. 651. But every presumption is against a trustee who aims to show that trust funds in his possession have been converted into an ordinary debt from him. Stewart's Estate, 140 Penn. St. 124; Dufford *v.* Smith, 46 N. J. Eq. 216; Pence *v.* Force, id. 348; Nichols, Appellant, 157 Mass. 20.

(a) Gisborn *v.* Charter Oak Life Ins. Co., 142 U. S. 326; Gilmore *v.* Ham, 142 N. Y. 1; McGuire *v.* Devlin, 158 Mass. 63; Drake *v.* Wild, 65 Vt. 611; Gilmer *v.* Billings, 55 F. R. 775; Lemoine *v.* Dunklin County, 51 id. 487; Swift *v.* Smith, 79 id. 709; Warren *v.* Adams, 19 Col. 515; Fawcett *v.* Fawcett, 85 Wis. 332; Dole *v.* Wilson, 39 Minn. 330; Burrus *v.* Mea-

dors, 90 Ala. 140; Long *v.* Vallean, 87 Iowa, 675; Talbott *v.* Barber, 11 Ind. App. 1; Jones *v.* Henderson, 149 Ind. 458; Howard *v.* Quattlebaum, 46 S. C. 95; Maxwell *v.* Barringer, 110 N. C. 76; Reynolds *v.* Sumner, 126 Ill. 58; Eastman *v.* Davis, 68 Vt. 225; Dodge *v.* Hogan, 19 R. I. 4; Roach *v.* Caraffa, 85 Cal. 436; Spencer *v.* Duncan, 107 Cal. 423; Smith *v.* Combs, 49 N. J. Eq. 420; Hovey *v.* Bradbury, 112 Cal. 620; Fox *v.* Tay, 89 Cal. 339; Lucio *v.* De Toro, 91 Cal. 405; Stillwell *v.* Leavy, 84 Ky. 379; Landis *v.* Saxton, 105 Mo. 486; Gapen *v.* Gapen, 41 W. Va. 422; Thomas *v.* Glendinning, 13 Utah, 47; Harigan *v.* Smith (N. J. Eq.), 40 Atl. 13.



doctrine of prescription by the lapse of twenty years,<sup>1</sup> and so long as the relation of trustee and *cestui* continues unbroken, the possession of the trustee is that of the *cestui*, and there

3 Johns. Ch. 190; *Baker v. Whiting*, 3 Sumn. 486; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Shibla v. Ely*, 2 Halst. Ch. 181; *Prevost v. Gratz*, 6 Wheat. 481; *Lyon v. Maclay*, 1 Watts, 275; *Zacharias v. Zacharias*, 23 Penn. St. 425; *Glass v. Gilbert*, 58 id. 266; *McCandless's Est.*, 61 id. 9; *Fox v. Cook*, 11 id. 211; *White v. White*, 1 Md. Ch. 53; *Weaver v. Leiman*, 52 Md. 710; *Thomas v. Brinsfield*, 7 Ga. 154; *Tinnen v. McCane*, 10 Tex. 248; *Hopkins v. Hopkins*, 4 Strob. Eq. 207; *Buckner v. Calcott*, 28 Miss. 575; *Callis v. Folsom*, 6 Gill & J. 80; *Brinkley v. Willis*, 22 Ark. 1; *Goodrich v. Pendleton*, 3 Johns. Ch. 387; *Coster v. Murray*, 5 id. 522; 20 Johns. 52; *Allen v. Wooley*, 1 Green, Ch. 209; *Manton v. Titworth*, 18 B. Mon. 582; *Finney v. Cochran*, 1 W. & S. 118; *Walker v. Walker*, 16 S. & R. 379; *McDowell v. Goldsmith*, 6 Md. 319; *Alexander v. Williams*, 1 Hill (S. C.), 522; *Mussey v. Mussey*, 2 Hill, Ch. 496; *Burham v. James*, 1 Speer, Eq. 375; *Tucker v. Tucker*, 1 McCord, Ch. 176; *Presley v. Davis*, 7 Rich. Eq. 105; *Prewett v. Buckingham*, 28 Miss. 92; *Soggens v. Heard*, 31 Miss. 426; *Payne v. Ballard*, 23 Miss. 88; *Gay v. Edwards*, 30 Miss. 218; *Carter v. Bennett*, 6 Fla. 214; *Paff v. Kenney*, 1 Bradf. 1; *Howard v. Aiken*, 3 McCord, 467; *Wickliffe v. Lexington*, 11 B. Mon. 161; *Smith v. Calloway*, 7 Blackf. 86; *McDonald v. Sims*, 3 Kelly, 383; *Murdock v. Hughes*, 7 Sm. & Mar. 219; *Farnum v. Brooks*, 9 Pick. 212; *Johnson v. Humphrey*, 14 S. & R. 394; *Flemming v. Culbert*, 46 Penn. St. 496; *Pinston v. Ivey*, 1 Yerg. 296; *Williams v. Cook*, 1 Green, Ch. 209; *Foscue v. Foscue*, 2 Ired. Eq. 321; *Young v. Mackall*, 3 Md. Ch. 56; *Armstrong v. Campbell*, 3 Yerg. 201; *Overstreet v. Bates*, 1 J. J. Marsh. 370; *Thompson v. Blair*, 3 Murph. 583; *Jones v. Parsons*, 2 Hawkes, 269; *Martin v. Jackson*, 27 Penn. St. 506; *North v. Barnum*, 12 Vt. 206; *Goodhue v. Barnwell*, Rice, Eq. 198; *Redwood v. Riddick*, 4 Munf. 222; *Wamburzee v. Kennedy*, 4 Des. 479; *Anstice v. Brown*, 6 Paige, 488; *Bohannon v. Strespley*, 2 B. Mon. 438; *Pinkston v. Brewster*, 14 Ala. 315; *Boone v. Chiles*, 10 Pet. 177; *Oliver v. Piatt*, 3 How. 333; *Zeller v. Eckert*, 4 How. 289; *Seymour v. Freer*, 8 Wall. 203; *Creigh v. Henson*, 10 Grat. 231; *Starke v. Starke*, 3 Rich. 438; *Perkins v. Cartwell*, 4 Harring. 270; *Varick v. Edwards*, 11 Paige, 289; *Blount v. Robeson*, 3 Jones Eq. 73; *Fish v. Wilson*, 15 Tex. 430; *Cunningham v. McKindley*, 22 Md. 149; *Kutz's App.*, 40 Penn. St. 90; *Norton v. Ladd*, 22 Conn. 203; *Long v. Casson*, 4 Rich. Eq. 60; *Parris v. Cobb*, 5 Rich. Eq. 432; *Keaton v. Greenwood*, 8 Ga. 97; *Simmes v. Smith*, 11 Ga. 195; *Kimball v. Ives*, 17 Vt. 430; *Rix v. Smith*, 8 Vt. 55; *Evarts v. Nason*, 11 Vt. 122; *Mather v. Bennett*, 21 N. H. 204; *Cartmell v. Perkins*, 2 Del. Ch. 102.

<sup>1</sup> *McCarthy v. McCarthy*, 74 Ala. 546.

can be no adverse possession for time to run upon.<sup>1</sup> The trustee must clearly repudiate the trust and assume an adverse position, with notice to the *cestui*, before the statute can begin to run.<sup>2</sup> When these facts exist for twenty years an action to recover the land is barred;<sup>3</sup> and when the relation of trust is denied, or time and acquiescence have obscured its nature, or the acts of the parties raise a presumption unfavorable to its continuance, the lapse of time may be a ground for refusing relief.<sup>4</sup> The mere fact that money due the *cestui* is allowed by him to remain in the trustee's hands does not change the nature of the debt, it continues to be a trust debt,<sup>5</sup> upon which neither bankruptcy of the trustee nor the statute of limitations can take effect. Accounts have been decreed against trustees, extending over periods of thirty, forty, and even fifty years.<sup>6</sup> The relations and privity between trustee and *cestui que trust* are such that the possession of the one is the possession of the other, and there can be no adverse claim or possession during the continuance of the relation.<sup>7</sup> Lord Justice Knight Bruce said, that where one entered into possession as trustee, he could not be permitted to set up a possession or title in himself adverse to the *cestui que trust*.<sup>8</sup> It is the duty of the trustee, if he intends to claim the estate, to resign his trust and deliver over the possession which he received as trustee.<sup>9</sup> He

<sup>1</sup> Russell v. Peyton, 4 Brad. (Ill.) 473.

<sup>2</sup> Ibid.; Hubbard v. U. S. Mortgage Co., 14 Brad. (Ill.) 40; Chicago & Eastern Ill. R. Co. v. Hay, 119 Ill. 493; Thomas v. Merry, 113 Ind. 83; Speidel v. Henrici, 120 U. S. 377.

<sup>3</sup> Ward v. Harvey, 111 Ind. 471; Otto v. Schlapkahl, 57 Iowa, 226.

<sup>4</sup> Helm's Ex'r v. Rogers, 81 Ky. 568.

<sup>5</sup> Crisfield v. State, 55 Md. 192.

<sup>6</sup> Beaumont v. Boulton, 5 Ves. 485; Townshend v. Townshend, 1 Cox, 28; Chalmer v. Bradley, 1 J. & W. 51; Att. Gen. v. Brewers' Co., 1 Mer. 495; Burrows v. Gore, 6 H. L. Cas. 907; Wood v. Arch, 12 Sim. 472; Man v. Ricketts, 13 L. J. (N. S.) Ch. 194; Snow v. Booth, 8 De G., M. & G. 69; Cox v. Dolman, 2 De G., M. & G. 592; West v. Sloan, 3 Jones, Eq. 102.

<sup>7</sup> Ibid.

<sup>8</sup> Stone v. Godfrey, 5 De G., M. & G. 86.

<sup>9</sup> Ibid.; Att. Gen. v. Munro, 2 De G. & Sm. 163; *Ex parte Andrews*,

will then be in a position to maintain his claim, for no claim should be made through a breach of trust. And no trustee, while occupying a place of trust and confidence, should be allowed to set up an adverse title.<sup>1</sup> This rule applies to all acting as trustees, whether regularly appointed or not.<sup>2</sup> It also applies to all who stand in a fiduciary relation to others, as executors, administrators, guardians, or agents.<sup>3</sup> A *cestui que trust* cannot set up the statute against his *co-cestuis que trust*,<sup>4</sup> nor against his trustee.<sup>5</sup> If one holds the title to land as security for money, and the money is paid to him and received, he cannot plead the statute as a bar to a bill for a reconveyance.<sup>6</sup> These rules apply to all cases of express trusts.<sup>7</sup> After the termination of a trust a

2 Rose, 412; Kennedy v. Daly, 1 Sch. & Lef. 381; Shields v. Atkins, 3 Atk. 560; Pomfret v. Winsor, 2 Ves. 476; Conry v. Caulfield, 2 B. & B. 272; Langley v. Fisher, 9 Beav. 90; Reece v. Trye, 1 De G. & Sm. 279; Newsome v. Flowers, 30 Beav. 461; Frith v. Curtland, 2 Hem. & M. 417; Huntly v. Huntly, 8 Ired. Eq. 250.

<sup>1</sup> See cases cited in last note.

<sup>2</sup> Lyon v. Maclay, 1 Watts, 275; Life Asso. v. Siddall, 3 De G., F. & J. 58; 7 Jur. (N. S.) 785; Johnson v. Smith, 27 Mo. 591, is to the contrary; Hayden v. Stone, 1 Duvall, 396.

<sup>3</sup> Pelley v. Bascombe, 33 L. J. Ch. 100; 34 L. J. Ch. 233; Thomas v. Thomas, 2 K. & J. 79; Lindsay v. Lindsay, 1 Des. 150; Carr v. Bob, 7 Dana, 417; Blue v. Patterson, 1 Dev. & Bat. Eq. 457; Bird v. Graham, 1 Ired. Eq. 196; Nelson v. Cornwall, 1 Grat. 174; Lafferty v. Farley, 3 Sneed, 157; Jacobs v. Pou, 18 Ga. 346; Marsh v. Oliver, 1 McCart. 259; Brittlebank v. Goodwin, L. R. 5 Eq. 545; Hart's App., 32 Conn. 520; Butler v. Carter, L. R. 5 Eq. 276; Moore v. Sheppard, 2 Duv. 125. Some States have statutes that bar claims against executors and administrators after a certain time, and in nearly all the States a presumption of payment of debts, legacies, and other charges, will arise after a great length of time. Angell on Limitations, §§ 166, 178; Wilkinson's Est., 1 Pars. Eq. 170; Graham v. Torrance, 1 Ired. Eq. 210; Shearin v. Eaton, 2 id. 282; Hudson v. Hudson, 3 Rand. 117; Skinner v. Skinner, 1 J. J. Marsh. 594; Graham v. Davidson, 2 Dev. & B. 155; Hayes v. Goode, 7 Leigh, 452; Tate v. Connor, 2 Dev. Eq. 244.

<sup>4</sup> Foscoe v. Foscoe, 2 Ired. 321; Hastie & Silver v. Aiken, 67 Ala. 317.

<sup>5</sup> Spickernell v. Hotham, 1 Kay, 669; Knight v. Bowyer, 4 De G. & J. 421.

<sup>6</sup> Millard v. Hathaway, 27 Cal. 119.

<sup>7</sup> Manby v. Bewicke, 3 K. & J. 342; Dickenson v. Teasdale, 1 De G.,

reasonable time is allowed for settlement, and then the statute begins to run.<sup>1</sup> The statute does not run in favor of a trustee against his *cestui* while the *latter* is in possession.<sup>2</sup> (a) After the statute begins to run in favor of the *cestui* the death of the trustee will not suspend it.<sup>3</sup>

§ 864. It has been held, however, that if a trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the notice or knowledge of the *cestui que trust* in such manner that he is called upon to assert his equitable rights, the statute will begin to run from the time that such knowledge is brought home to the *cestui que trust*, and he will be completely barred at the end of twenty years, if he has been *sui juris*, or under no disability, and is capable of bringing an action to maintain his right.<sup>4</sup> To enable a trustee, without giving up the possession, to turn it into an adverse holding against the *cestui que trust*, the evidence must be clear

J. & Sm. 52; *Sturgis v. Morse*, 3 De G. & J. 1; *Watson v. Saul*, 1 Gif. 188; *Webster v. Newbold*, 41 Penn. St. 482.

<sup>1</sup> *Miller v. Morrison*, 22 S. C. 590.

<sup>2</sup> *Gilbert v. Sleeper*, 71 Cal. 294; *Clark v. Clark*, 21 Neb. 402.

<sup>3</sup> *Clark v. Clark*, 21 Neb. 402.

<sup>4</sup> *Merriam v. Hassam*, 14 Allen, 522; *Baker v. Whiting*, 3 Sumn. 486; *Kane v. Bloodgood*, 7 Johns. Ch. 90; *Att. Gen. v. Federal St. Meeting-house*, 3 Gray, 1; *Bright v. Egerton*, 2 De G., F. & J. 606; *Wedderburn v. Wedderburn*, 2 Keen, 749; 4 M. & Cr. 52; *Portlock v. Gardner*, 1 Hare, 594; *Wickliffe v. Lexington*, 11 B. Mon. 161; *Turner v. Smith*, 11 Tex. 629; *Grumbles v. Grumbles*, 17 Tex. 472; *Williams v. First Presby. Soc.*, 1 Ohio St. 478; *Robertson v. Wood*, 15 Tex. 1; *Halsey v. Tate*, 52 Penn. St. 311; *Hunter v. Hubbard*, 26 Tex. 537; *Curtis v. Daniel*, 23 Ark. 363; *Neel v. McElhenny*, 69 Pa. St. 300; *Hubbell v. Medbury*, 53 N. Y. 98; *Davis v. Coburn*, 128 Mass. 377.

(a) *Miller v. Baker*, 160 Penn. St. 172; *Boyd v. Boyd*, 163 Ill. 611; *Norton v. McDevit*, 122 N. C. 755. So the statute does not run against an intending vendee of land in possession under a contract to purchase. *Gilbert v. Sleeper*, 71 Cal. 290. The donee of a power may acquire title to the property by adverse possession. *Teall v. Schroder*, 158 U. S. 172.

and unmistakable, and such adverse claim must be brought home to the *cestui que trust* beyond question or doubt. The attitude of the trustee must be hostile, and continuously so; and there must be no mistake or misapprehension as to the character of his holding, by either party.<sup>1</sup> Where the trustee makes a conveyance of the trust property in breach of the trust, and his grantee continues to hold adversely, the statute applies;<sup>2</sup> and so where the relation of trustee and *cestui que trust* is absolutely ended, whether by breach of the trust or otherwise.<sup>3</sup> But in such case the statute will not begin to run so long as the *cestui que trust* is under the control or influence of the trustee.<sup>4</sup> Where a trustee paid over the trust fund to a married woman, the statute began to run as soon as she became discovert.<sup>5</sup> So where the trustee paid over the trust fund to a minor *cestui que trust*, and denied all further liability, the statute began to run as soon as the minor became of age.<sup>6</sup> (a) After the lapse of twenty years, no claim or complaint having been made, the court will presume that a trustee performed his duty.<sup>7</sup>

§ 865. It has been urged that the statute cannot apply in favor of persons who become trustees by construction of law; as, where a person is construed into a trustee of property which he has fraudulently obtained, or where a trust estate is traced into his hands, or where a resulting<sup>8</sup> trust arises;

<sup>1</sup> Ibid.; Zeller v. Eckert, 4 How. 295; Whithead v. Lord, 11 Eng. L. & Eq. 587; Scott v. Haddock, 11 Ga. 258; Moffatt v. Bingham, 11 Humph. 369; Lister v. Pickford, 34 L. J. Ch. 582; Cunningham v. McKindley, 22 Md. 149; Andrews v. Smithwick, 20 Tex. 111; White v. Leavitt, id. 703; Lewis v. Castleman, 27 Tex. 407.

<sup>2</sup> Williams v. First Presby Soc., 1 Ohio St. 478; White v. White, 1 Md. Ch. 56.

<sup>3</sup> Wickliffe v. Lexington, 11 B. Mon. 161.

<sup>4</sup> Welborn v. Rogers, 24 Ga. 558; Keaton v. McGwier, id. 217.

<sup>5</sup> Harrison v. Brolaskey, 20 Pa. St. 299.

<sup>6</sup> Sollee v. Croft, 7 Rich. Eq. 34.

<sup>7</sup> Syester v. Brewer, 27 Md. 288.

<sup>8</sup> Dow v. Jewell, 18 N. H. 340; Cole v. Noble, 63 Tex. 434, the court

(a) McCrary v. Clements, 95 Ga. 778.

and that the *cestui que trust* is not precluded, in such cases, from his remedy by lapse of time. But the later authorities establish the doctrine that the statute applies in such cases.<sup>1</sup> (a) Lord Redesdale, after stating the ground upon

saying that with *constructive* trusts the statute will run from the time the *cestui* could have indicated his right by action or otherwise; but in case of *resulting trusts where there is no adverse holding*, the statute does not run. In a prior case (*Kennedy v. Baker*, 59 Tex. 151), it was held that the statute does not apply to resulting trusts, and it may be difficult for some people to conceive of a resulting trust in which there is not an adverse holding. If the trust is not evidenced in such a way as to create a valid express trust, then the holding is on its face adverse.

<sup>1</sup> *McClane v. Shepherd*, 21 N. J. Eq. 76; *Strimfler v. Roberts*, 18 Penn. St. 300; *Prevost v. Gratz*, 6 Wheat. 480; *Sheppards v. Turpin*, 3 Grat. 373; *Murdoch v. Hughes*, 7 Sm. & M. 219; *Cuyler v. Bradt*, 2 Caines's Case. 326; *Davis v. Cotton*, 2 Jones, Eq. 430; *Cunningham v. McKindley*, 22 Md. 149; *Weaver v. Leiman*, 52 Md. 710; *Marrion v. Titsworth*, 18 B. Mon. 582; *Howell v. Howell*, 15 Wis. 55; *Townshend v. Townshend*, 1 Bro. Ch. 550; *Bonney v. Ridgard*, 1 Cox, 145; *Andrew v. Wrigley*, 4 Bro. Ch. 125; *Collard v. Hare*, 2 R. & M. 675; *Cholmondeley v. Clinton*, 2 J. & W. 190; 4 Bligh, 4; *Bell v. Bell*, t. Plunk. 661; *Portlock v. Gardner*, 1 Hare, 594; *Ex parte Hasell*, 3 Y. & Col. 622; *Wedderburn v. Wedderburn*, 4 My. & C. 53; *Att. Gen. v. Christ Hospital*, 3 My. & K. 344; *Rolfe v. Gregory*, 11 Jur. (N. S.) 98; 4 De G., J. & S. 576; *Hecht v. Slaney*, 72 Cal. 363; *Kennedy v. Kennedy*, 25 Kans. 151; *Price v. Mulford*, 107 N. Y. 303; *University v. Bank*, 96 N. C. 280; *Beard v. Stanton*, 15 S. C. 164; *Speidel v. Henrici*, 120 U. S. 377.

(a) The statute does not usually run against an express trust until there is an open disavowal of the trust, or some breach of faith giving a cause of action. *Prior v. McIntire*, 7 App. D. C. 417; *Hayne v. McIntire*, id. 449; *Lyell v. Kennedy*, 14 A. C. 437; *Speidel v. Henrici*, 120 U. S. 377, 386; *Wardens v. Att. Gen.*, 164 Mass. 188; *Currier v. Studley*, 159 Mass. 17; *Preston v. Horwitz*, 85 Md. 164; *Carter v. Uhlein* (N. J. Eq.), 36 Atl. 956; *Middaugh v. Fox*, 135 Ill. 344; *Jones v. Home S. Bank* (Mich.), 76 N. W. 322; *Kellogg v. Western El. Co.*, 67 Ill. App. 153; *Butler v. Hyland*, 89 Cal. 575; *Smith v. Glover*, 44 Minn. 260; *Sprague v. Bond*, 108 N. C. 382; *Davis v. Boyden*, 123 N. C. 283; *supra*, § 863, and notes; *Kennedy v. Winn*, 80 Ala. 165. When a trust is imposed by law, as in the case of a resulting trust, the statute begins to run in favor of the holder of the legal title against the equitable owner at the time of the conveyance, if there is no recognition of the *cestui's* rights; if his rights are recognized, then at the time when the holder of the legal title begins to hold adversely.

which a direct trust was not within the statute, said: "But the question of fraud is of a very different description; that is a case where a person, who is in possession by virtue of a fraud, is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree of a court of equity founded on the fraud; and his possession in the mean time is adverse to the title of the person who impeaches the transaction on the ground of fraud."<sup>1</sup> Sir William Grant made similar observations.<sup>2</sup> All trusts arising by operation of law, whether implied, resulting, or constructive, are subject to the statute. Where persons claiming in their own right are turned into trustees by implication the bar will be effective.<sup>3</sup> Equity will refuse to interfere in case of implied trusts after long acquiescence (twenty years in this case) not only where time has dimmed the facts, but even where it is perfectly clear that relief would originally have been given.<sup>4</sup> But where one purchases land partly with the money of another, he cannot set up the *laches* of the latter during the time he admitted the *cestui's* rights. The statute will only begin to run in such case from the time he set up an adverse claim.<sup>5</sup> But if the injured parties are minors or

<sup>1</sup> *Hovenden v. Annesley*, 2 Sch. & Lef. 633; *Wilmerding v. Russ*, 33 Conn. 67; *Best v. Campbell*, 62 Penn. St. 476; *Ashurst's App.*, 60 id. 290; *German Am. Sem. v. Keifer*, 43 Mich. 105.

<sup>2</sup> *Beckford v. Wade*, 17 Ves. 97. But see *Sturgis v. Morse*, 3 De G. & J. 1; *Taylor v. Gooche*, 4 Jones, L. 436. See *ante*, §§ 141, 228, 229, 230, and cases cited.

<sup>3</sup> *School Directors v. School Directors*, 16 Brad. (Ill.) 653.

<sup>4</sup> *Hendrickson v. Hendrickson*, 42 N. J. Eq. 657.

<sup>5</sup> *Springer v. Springer*, 114 Ill. 550.

*Parks v. Satterthwaite*, 132 Ind. 557; *Woods v. Stevenson*, 43 W. 411; *Currier v. Studley*, 159 Mass. Va. 149; *Norton v. McDevit*, 122 17; *Cone v. Dunham*, 59 Conn. 145; N. C. 755; *Nougues v. Newlands*, Marshall's Estate, 138 Penn. St. 118 Cal. 102; *Broder v. Conklin*, 285; *Inlow v. Christy*, 187 id. 186; 121 Cal. 282; *Plass v. Plass*, 122 Condit v. Maxwell, 142 Mo. 266; Cal. 3; *Long v. King* (Ala.), 23 So. Reed v. Painter, 145 Mo. 341; 534; *Harris v. Sewell*, 87 Ky. 63; *Mayfield v. Forsyth*, 164 Ill. 32; *Willis v. Roberts* (Ky.), 27 S. W. Cooksey v. Bryan, 2 App. D. C. 976.

persons under disability, time will not run against them,<sup>1</sup> (a) nor if they are under the influence or control of a former guardian or trustee.<sup>2</sup>

§ 866. Courts, in many cases, presume acts to have been done after a great length of time, as, that payments have been made, releases and conveyances executed, or rights abandoned.<sup>3</sup> As a general rule, they adopt the statute bar at law as the period at the end of which they will give effect to such presumptions.<sup>4</sup> The presumptions are made, in the absence of evidence, for the purpose of quieting titles,<sup>5</sup> and because there is no better ground to go upon.<sup>6</sup> If positive evidence is produced, the fact may be found or presumed after a much shorter period. On the other hand, if there is positive evidence which negatives the fact, the presumption cannot be made after a much longer period; for the rule is, *stabit præsumptio donec probetur in contrarium*. Recognition by the trustee of the trust as continuing repels the presumption of payment that would otherwise arise after twenty years.<sup>7</sup> Presumptions, after a long time, are favored in law; and courts will not allow them to be controlled or rebutted

<sup>1</sup> Miles v. Wheeler, 43 Ill. 123.

<sup>2</sup> Hayden v. Stone, 1 Duv. 396.

<sup>3</sup> Pattison v. Hawkesworth, 10 Beav. 375; Att. Gen. v. Moor, 20 Beav. 119; Clemenston v. Williams, 8 Cranch, 72; Jackson v. Sackett, 7 Wend. 94; Bass v. Williams, 8 Pick. 187; Ashurst's App., 60 Penn. St. 290; Scott v. Knox, 4 Ir. Eq. 411.

<sup>4</sup> Eldridge v. Knott, Cowp. 214.

<sup>5</sup> Ibid.; Grenfell v. Girdlestone, 2 Y. & Col. 682; Magdalen College v. Att. Gen., 3 Jur. (N. S.) 675.

<sup>6</sup> Ibid.; Hillary v. Waller, 12 Ves. 266; Hawkins v. Chapman, 36 Md. 100.

<sup>7</sup> Werborn v. Austin, 82 Ala. 498.

(a) In Kentucky it is held that *cestui que trust* is an infant, and when a trustee holds the legal title to real estate, which is barred by the statute of limitations, the equitable interests dependent upon it will also be defeated, though the *cestui que trust* is an infant, and though the trust is a constructive trust because of his being a purchaser for value. Willson v. Louisville Trust Co. (Ky.), 44 S. W. 121; see *supra*, § 858, n. (a).



by slight evidence, or doubtful circumstances.<sup>1</sup> In cases where a possession may be lawful and rightful, it cannot be presumed to be adverse. Thus one tenant in common cannot be presumed to hold adversely to the other, unless something more is shown than mere lapse of time. (a) A trustee cannot be presumed to hold adversely to his *cestui que trust*: on the contrary, he is presumed to hold for his *cestui que trust* until the contrary appears.<sup>2</sup>

§ 867. It is clear that a person, in ignorance of his right, cannot be presumed to have abandoned it,<sup>3</sup> especially if there is a fraudulent concealment of the cause of action by the guilty party.<sup>4</sup> One under disability cannot be presumed to have released a right.<sup>5</sup> If persons are in poverty or distress, the force of the presumption is weakened.<sup>6</sup> So a release from a large number of persons cannot be presumed with the same force; for where interests are divided, they are not prosecuted with the same diligence.<sup>7</sup>

<sup>1</sup> Jones v. Turberville, 2 Ves. Jr. 13; Grenfell v. Girdlestone, 2 Y. & Col. 682.

<sup>2</sup> Harmood v. Oglander, 6 Ves. 199; 8 Ves. 106; Doe v. Phillips, 10 Q. B. 130; Young v. Waterplank, 13 Sim. 204; Garrard v. Tuck, 8 C. B. 248; Melling v. Leak, 16 C. B. 652; Creigh v. Henson, 10 Grat. 231; Colvin v. Menefee, 11 id. 92; Whiting v. Whiting, 4 Gray, 237.

<sup>3</sup> Cholmondeley v. Clinton, 2 Mer. 362; Randall v. Errington, 10 Ves. 427; Roche v. O'Brien, 1 B. & B. 330; Pickering v. Stamford, 2 Ves. Jr. 280, 285; Chalmer v. Bradley, 1 J. & W. 65; Bennett v. Colley, 2 My. & K. 232; Stone v. Godfrey, 5 De G., M. & G. 76; Blennerhassett v. Day, 2 B. & B. 118; Stackpole v. Dameron, 1 Bro. P. C. 1.

<sup>4</sup> Pilcher v. Flinn, 30 Ind. 202.

<sup>5</sup> March v. Russell, 3 M. & Cr. 31; Bennett v. Colley, 5 Sim. 181; 2 My. & K. 225; Thompson v. Simpson, 1 Dr. & W. 489.

<sup>6</sup> Roche v. O'Brien, 1 B. & B. 342; Hillary v. Waller, 12 Ves. 266; Gowland v. De Faria, 17 Ves. 25; Byrne v. Frere, 2 Moll. 171.

<sup>7</sup> Whichote v. Lawrence, 3 Ves. 740; 6 Ves. 632; York v. Mackenzie, 3 Bro. P. C. 42; Att. Gen. v. Duley, Coop. 146; Pinkston v. Brewster, 14 Ala. 320; Kidney v. Coussmaker, 12 Ves. 158; Hardwick v. Mynd, 1

(a) See Watson v. Sutro, 86 Cal. 253; King v. Carmichael, 136 Ind. 500; Mansfield v. McGinness, 86 20. Maine, 118; Day v. Davis, 64 Miss.

§ 868. When a defendant relies upon lapse of time, or upon presumptions arising therefrom, but not upon the absolute bar of the statute, he must plead or answer the facts. He cannot protect himself by demurrer.<sup>1</sup>

§ 869. Courts of equity will sometimes refuse to grant relief, although the statute of limitations cannot be pleaded in bar, and although presumptions cannot arise from lapse of time, or may be conclusively rebutted. In such cases, courts proceed upon the ground that the public convenience will not allow old and stale claims to be investigated, when many of the parties and witnesses are dead, or their memories impaired, and vouchers are lost. *Expedit reipublicæ ut sit finis litium*.<sup>2</sup> Thus, where a bill was brought against an executor for an account, there being no statute protection; and the presumption of a final settlement being rebutted, the court refused to open the accounts after a great lapse of time, when it was probable that most of the parties were dead, and the vouchers and receipts were lost.<sup>3</sup> (a) Mere lapse of time

Anst. 109; Elliott v. Merryman, 2 Atk. 42; Hercy v. Dinwoody, 2 Ves. Jr. 87. See chapter on Charitable Trusts.

<sup>1</sup> Deloraine v. Browne, 3 Bro. Ch. 633; Mitf. on Plead. 212. See Story's Eq. Plead., §§ 503, 751, 814.

<sup>2</sup> Att. Gen. v. Exeter, Jac. 448; Pickering v. Stamford, 2 Ves. Jr. 272, 582; Parker v. White, 11 Ves. 226; Morse v. Royal, 12 Ves. 374; Price v. Byrn, cited in Campbell v. Walker, 5 Ves. 681; Barwell v. Barwell, 34 Beav. 371; McKnight v. Taylor, 1 How. 161; Piatt v. Vattier, 9 Pet. 466; Thompson v. McGaw, 2 Watts, 161; Price's App., 54 Penn. St. 472.

<sup>3</sup> Hunton v. Davies, 2 Ch. R. 44; Huet v. Fletcher, 1 Atk. 457; Pearson v. Belchier, 4 Ves. 627; Hercy v. Dinwoody, 2 Ves. Jr. 87; St. John

(a) The neglect of an administrator or guardian to bring suit in proper time cannot prejudice the title of the ward or heir who is under disability. Collins v. McCarty, 68 Texas, 150; Grimsby v. Hudnell, 76 Ga. 378. Nor is such beneficiary barred by failure to file a final account. Fuller v. Cushman, 170 Mass. 286; see Burgwyn v. Daniel, 115 N. C. 115; Davis v. Eastman, 66 Vt. 651; 68 Vt. 225; Allen v. Bartlett, 52 Kansas, 387; Edwards v. Williams, 39 S. C. 86; Phifer v. Berry, 110 N. C. 463; Mitchell v. Thomson, 7 Mackey, 130; Longbotham's Estate, 57 N. Y. S. 118; Staakey v. Fox, 52 N. J. Eq. 758.

or delay in suing is such *laches* in the plaintiff, in a certain class of cases, that he is not entitled to relief, unless he can explain the delay. Thus, if a *cestui que trust* attempts to impeach a purchase of the trust estate by the trustee, a delay for much less than twenty years will bar his relief.<sup>1</sup> (a) In a bill to set aside a purchase made by a solicitor of the party,<sup>2</sup> or to set aside the sale of a reversion by an heir expectant,<sup>3</sup> or to impose a constructive trust upon a fraudulent purchaser,<sup>4</sup> or to call a tenant to an account for waste,<sup>5</sup> or to enforce the specific performance of a contract,<sup>6</sup> or where fraud is alleged to avoid the statute of limitations,<sup>7</sup> or where an account is sought by a surviving partner,<sup>8</sup> and in a large number of other cases, courts refuse to interfere actively after a considerable lapse of time, if the delay is unexplained by the party seeking relief.<sup>9</sup> But in cases of mere dry equitable demands, falling within the purview of some of the provisions of the statute of limitations, general *laches* short

*v. Turner*, 2 Vern. 418; *Campbell v. Graham*, 1 R. & M. 453; *Pomfret v. Winsor*, 2 Ves. 483; *Anderson v. Burwell*, 6 Grat. 405; *Smith v. Callo-way*, 7 Black. 86.

<sup>1</sup> *Parker v. White*, 11 Ves. 226; *Barwell v. Barwell*, 34 Beav. 371; *Morse v. Royal*, 12 Ves. 374; *Price v. Byrn*, cited in *Campbell v. Walker*, 5 Ves. 681.

<sup>2</sup> *Gresley v. Mansley*, 4 De G. & J. 78; *Lyddon v. Moss*, 4 De G. & J. 101.

<sup>3</sup> *Roberts v. Tunstall*, 4 Hare, 257.

<sup>4</sup> *Glegg v. Edmondson*, 3 Jur. (N. S.) 299; *Norris v. Le Neve*, 3 Atk. 38; *Pennell v. Home*, 3 Drew. 337; *Jackson v. Welsh*, Ll. & G. t. Plunk. 346. See *Amb.* 735, 737.

<sup>5</sup> *Harcourt v. White*, 28 Beav. 303.

<sup>6</sup> *Southcomb v. Exeter*, 6 Hare, 214; *Alloway v. Braine*, 26 Beav. 575; *Sharp v. Wright*, 28 Beav. 150; *Hope v. Gloucester*, 1 Jur. (N. S.) 320.

<sup>7</sup> *Blair v. Ormond*, 1 De G. & Sm. 428.

<sup>8</sup> *Tatam v. Williams*, 3 Hare, 347; *Harcourt v. White*, 28 Beav. 303.

<sup>9</sup> *Gresley v. Mansley*, 4 De G. & J. 95; *Roberts v. Tunstall*, 4 Hare,

(a) *Laches* applies to a purchase computed. *Kahn v. Chapin*, 152 of the trust estate by the trustee, N. Y. 305; *Bland v. Fleeman*, 58 Ark. 84; *McRoberts v. Carneal* *laches* is upon the interest to be (Ky.), 44 S. W. 442.

of the statutory period ought not to bar a plaintiff, for the reason that the legislature has prescribed a period which it deems sufficiently short for private and public convenience, and courts ought not to assume the power of abridging that period.<sup>1</sup>

§ 870. But acquiescence in a transaction may bar a party of his relief in a very short period. Thus, if one has knowledge of an act, or it is done with his full approbation, he cannot afterwards have relief. He is estopped by his acquiescence, and cannot undo that which has been done.<sup>2</sup> So if a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to part with their money or property, and he cannot complain that his interests are affected. His silence is acquiescence, and it estops him.<sup>3</sup>

§ 871. Questions sometimes arise as to how far back courts of equity will order an account of the mesne rents and profits to be taken. Where the *cestui que trust* seeks an account of rents and profits from an *express* trustee, there is no limitation of time, as the statute of limitations does not apply.<sup>4</sup> If the claim to rents and profits rests upon a *legal*

266; *Browne v. Crosse*, 14 Beav. 105; *Life Assoc. v. Siddall*, 3 De G., F. & J. 73; *Hawkins v. Chapman*, 36 Md. 100; *Hanson v. Worthington*, 12 Md. 441; *Glenn v. Hill*, 17 Md. 281; *Nelson v. Hagerstown Bank*, 27 Md. 51; *Badger v. Badger*, 2 Wall. 87.

<sup>1</sup> *Rochdale Canal Co. v. King*, 2 Sim. (N. S.) 89; *Penny v. Allen*, 7 De G., M. & G. 426; *Mehrtens v. Andrews*, 3 Beav. 76; *Leeds v. Amherst*, 2 Phil. 117; *Clarke v. Hart*, 6 H. L. Cas. 633; *Beaudry v. Montreal*, 11 Moore, P. C. C. 399; *Story v. Gape*, 2 Jur. (N. S.) 706.

<sup>2</sup> *Kent v. Jackson*, 14 Beav. 384; *Styles v. Guy*, 1 H. & Tw. 523; *Ex parte Morgan*, id. 328; *Graham v. Birkenhead Railw. Co.*, 2 Mac. & Gor. 146.

<sup>3</sup> *Leeds v. Amherst*, 2 Phil. 123; *Phillipson v. Gately*, 7 Hare, 523; *Stafford v. Stafford*, 1 De G. & J. 202; *Jorden v. Money*, 5 H. L. Cas. 185; *Rennie v. Young*, 2 De G. & J. 142; *McGivney v. McGivney*, 142 Mass. 156, 160 (20 years' silence.)

<sup>4</sup> *Att. Gen. v. Brewers' Co.*, 1 Mer. 498; *Mathew v. Brise*, 14 Beav. 341.

title, the remedy is at law, and the legal limitation must be applied.<sup>1</sup> If, however, in such case, the accounts are complicated, a court of equity may entertain jurisdiction to take the accounts; but the legal limitation of time will be adhered to.<sup>2</sup> Accounts may be taken in equity upon a legal title respecting *mines* and timber when an injunction is prayed for, but the legal limitation will be applied.<sup>3</sup> An infant may have a bill for an account upon a legal title, as every person entering upon an infant's lands is regarded in the light of a receiver for him, and this jurisdiction remains, though the bill is not filed until after his majority.<sup>4</sup> If, however, the infant has never had the possession, but it has always been held adversely to him, the remedy is at law.<sup>5</sup> So, after the death of a receiver of the rents and profits, a party entitled, although he had a remedy at law, may have a bill for an account of the assets.<sup>6</sup> The legal limitation in these cases is six years, or such other period as the statutes in the several States have established.<sup>7</sup> But if a party has

<sup>1</sup> *Jesus College v. Bloom*, 3 Atk. 262; *Dinwiddie v. Bailey*, 6 Ves. 136; *Taylor v. Crompton*, Bunb. 95; *Landsdowne v. Landsdowne*, 1 Madd. 137.

<sup>2</sup> *O'Connor v. Spaight*, 1 Sch. & Lef. 309; *Corp. of Carlisle v. Wilson*, 13 Ves. 276.

<sup>3</sup> *Winchester v. Knight*, 1 P. Wms. 406; *Pulteney v. Warren*, 6 Ves. 89; *Landsdowne v. Landsdowne*, 1 Madd. 116; *Parrott v. Palmer*, 3 My. & K. 632; *Jesus College v. Bloom*, 3 Atk. 262; *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 701; *Grierson v. Eyre*, 9 Ves. 346; *Garth v. Cotton*, 1 Dick. 211; *Lee v. Alston*, 1 Bro. Ch. 194.

<sup>4</sup> *Gardner v. Fell*, 1 J. & W. 22; *Roberdean v. Rouse*, 1 Atk. 543; *Yallop v. Halworthy*, 1 Eq. Cas. Ab. 7; *Newburgh v. Bickerstaffe*, 1 Vern. 295; *Curtis v. Curtis*, 2 Bro. Ch. 631; *Dormer v. Fortescue*, 3 Atk. 130; *Pulteney v. Warren*, 6 Ves. 89; *Morgan v. Morgan*, 1 Atk. 489; *Falkland v. Bertie*, 2 Vern. 342; *Doe v. Keen*, 7 T. R. 390; *Hicks v. Sallitt*, 3 De G., M. & G. 782; *Pascoe v. Swan*, 27 Beav. 508; *Blomfield v. Eyre*, 8 Beav. 250. But he must bring his bill within six years after his majority. *Lockey v. Lockey*, Pr. Ch. 518.

<sup>5</sup> *Crowther v. Crowther*, 23 Beav. 305.

<sup>6</sup> *Monypenny v. Bristow*, 2 R. & M. 117; *Gardner v. Fell*, 1 J. & W. 22; *Thomas v. Oakley*, 18 Ves. 186; *Landsdowne v. Landsdowne*, 1 Madd. 116.

<sup>7</sup> *Monypenny v. Bristow*, 2 R. & M. 125.

simply lost his plain remedy at law by some other event, he cannot invoke the aid of a court of equity.<sup>1</sup> If, however, a party loses his remedy at law by mistake, he may have an account in equity; for mistake is one of the heads of equity jurisdiction.<sup>2</sup> So if the remedy at law was lost by the fraud of the defendant,<sup>3</sup> or by other fault of his,<sup>4</sup> equity can give relief, and an account; but the legal limitations must be observed.<sup>5</sup>

§ 872. Where a party is rightfully seeking the possession of property, the court, if the plaintiff prevails, will order an account of the rents and profits, as incident to the relief. If the plaintiff is a *cestui que trust*, following the trust estate into the hands of a person claiming through the trustee, under such circumstances that the defendant himself is to be regarded as a trustee, the plaintiff will be entitled to an account of the rents and profits from the commencement of his title, or from the withholding of his rights by the defendant.<sup>6</sup> The case will be much stronger if the plaintiff is an infant, or there has been any fraud or concealment.<sup>7</sup> But if the plaintiff is not a *cestui que trust*, but is an *equitable owner*

<sup>1</sup> *Barnwall v. Barnwall*, 3 Ridg. P. C. 71; *Hutton v. Simpson*, 2 Vern. 722; *Norton v. Frecker*, 1 Atk. 525; *Pulteney v. Warren*, 6 Ves. 88.

<sup>2</sup> *Bolton v. Deane*, Pr. Ch. 516; *Dormer v. Fortescue*, Ridg. t. Hardw. 183; *Barnwall v. Barnwall*, 3 Ridg. P. C. 68.

<sup>3</sup> *Ibid.*; *Bennett v. Whitehead*, 3 P. Wms. 644.

<sup>4</sup> *Pulteney v. Warren*, 6 Ves. 73. See *Dormer v. Fortescue*, 3 Atk. 124; *Reade v. Reade*, 5 Ves. 744; 3 Atk. 336; *Edwards v. Morgan*, McClel. 541; *Reynolds v. Jones*, 2 S. & S. 206; *Thomas v. Thomas*, 2 K. & J. 85; *Agar v. Fairfax*, 17 Ves. 552; *Moor v. Black*, t. Talb. 126; *Mundy v. Mundy*, 2 Ves. Jr. 122; *D'Arcy v. Blake*, 2 Sch. & Lef. 387; *Wild v. Wells*, 1 Dick. 3; *Meggott v. Meggott*, id. 794; *Goodenough v. Goodenough*, 2 Dick. 798; *Tilly v. Bridges*, Pr. Ch. 252; *Owen v. Aprice*, 1 Ch. R. 32.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Barnwall v. Barnwall*, 3 Ridg. P. C. 66; *Sturgis v. Morse*, 3 De G. & J. 1; 24 Beav. 54; *Wright v. Chard*, 4 Drew. 673; *Kidney v. Coussmaker*, 12 Ves. 158.

<sup>7</sup> *Hicks v. Sallitt*, 3 De G., M. & G. 782; *Schroder v. Schroder*, Kay, 591; *Pascoe v. Swan*, 27 Beav. 508; *ante*, § 871.

merely, seeking to recover the estate against a *bona fide* adverse holder of the possession, the account will not, unless there are special circumstances, be carried back of six years, where that is the statute limitation, or to the inception of the title within that time.<sup>1</sup> This was the rule in the earlier cases; but the later cases determine that where there is no trust, infancy, fraud, nor concealment, the accounts will not be carried back beyond the filing of the bill,<sup>2</sup> unless there was a previous demand for the possession, in which case they may be carried back to the time of the demand.<sup>3</sup> In one case, where the plaintiff was an infant, and the defendant a trustee in fact, but ignorant of his character, the court refused to carry the accounts further back than the filing of the bill.<sup>4</sup> If the plaintiff, as *cestui que trust* or equitable owner, is guilty of *laches*, courts will not carry the accounts further back than the filing of the bill;<sup>5</sup> and if the *laches* are very gross, the accounts will not be carried further back than the decree.<sup>6</sup> Nor will the decree for an account embrace the rents and profits "which the defendant might have received without neglect or default;" and all just allowances will be ordered in taking the account,<sup>7</sup> unless the defendant is guilty of gross fraud;<sup>8</sup> so interest may be disallowed.<sup>9</sup> An assignee who receives the rents and profits

<sup>1</sup> *Dormer v. Fortescue*, Ridg. t. Hardw. 183; 3 Atk. 130; *Hobson v. Trevor*, 2 P. Wms. 191; *Coventry v. Hall*, 2 Ch. Cas. 134; *Reade v. Reade*, 5 Ves. 749; *Harmood v. Oglander*, 6 Ves. 215; *Drummond v. St. Albans*, 5 Ves. 439; *Stackhouse v. Barnston*, 10 Ves. 470.

<sup>2</sup> *Pulteney v. Warren*, 6 Ves. 93; *Edwards v. Morgan*, McClel. 541, 554; *Hicks v. Sallitt*, 3 De G., M. & G. 813; *Thomas v. Thomas*, 2 K. & J. 79.

<sup>3</sup> *Ibid.*; *Penny v. Allen*, 7 De G., M. & G. 409.

<sup>4</sup> *Drummond v. St. Albans*, 5 Ves. 433. But the case is of doubtful authority. See *Hicks v. Sallitt*, 3 De G. & J. 811, 815.

<sup>5</sup> *Dormer v. Fortescue*, Ridg. t. Hardw. 183; 3 Atk. 130; *Cook v. Arnham*, 2 Eq. Cas. Ab. 245; *Pettward v. Prescott*, 7 Ves. 541; *Bowes v. East London Water Co.*, 3 Madd. 375; *Pickett v. Loggon*, 14 Ves. 215; *Schroder v. Schroder*, Kay, 591; *Kidney v. Coussmaker*, 12 Ves. 158.

<sup>6</sup> *Acherley v. Roe*, 5 Ves. 565.

<sup>7</sup> *Howell v. Howell*, 2 M. & C. 478.

<sup>8</sup> *Stackpole v. Davoren*, 1 Bro. P. C. 9.

<sup>9</sup> *Brinkley v. Willis*, 22 Ark. 1.

will be accountable in the first instance, but he will not be chargeable with interest.<sup>1</sup> In case the assignee is insolvent, the trustee who assigned the estate in breach of the trust may be called upon, and he must pay interest.<sup>2</sup> Separate bills for the recovery of the estate, and for an account of the mesne profits, may be filed.<sup>3</sup>

<sup>1</sup> *Macartney v. Blackwood*, Ridg., Lapp & Sch. 602.

<sup>2</sup> *Vandebende v. Livingstone*, 3 Swanst. 625.

<sup>3</sup> *Hall v. Coventry*, 2 Ch. Cas. 134; *Wright v. Chard*, 4 Drew. 673.



## CHAPTER XXIX.

ACTIONS IN RESPECT TO TRUST PROPERTY — PARTIES — PLEADING  
— PRACTICE.

- §§ 873, 874. Both the *cestuis que trust* and the trustees are required to be joined when the action is between strangers and the trust estate.
- § 875. Where the suit is between the *cestuis que trust* and the trustees.
- § 876. Where the *cestuis que trust* bring an action against the trustees, all the trustees ought to be joined as defendants.
- § 877. Where third persons ought to be joined with the trustees.
- § 878. Where courts will allow a suit to go on, though all the trustees are not joined.
- § 879. Where the trustees are guilty of a *tort*.
- § 880. Where a wife commits a breach of trust, her husband must be joined.
- § 881. *Cestuis que trust* ought all to be joined as plaintiffs when they bring an action against trustees.
- § 882. Where they need not all be joined.
- § 883. Where the court will allow the suit to go on, although the *cestuis que trust* are not all joined.
- § 884. Where suits are brought between cotrustees.
- § 885. Where the parties are numerous.
- §§ 886, 887. All the parties in the same interest ought to be joined on the same side.
- § 888. Trustees ought to join in their answer.
- § 889. Married woman ought to join her husband in her answer, but may answer separately.
- § 890. Necessary allegations.
- § 890 a. Form of action, *quo warranto*, *ejectment*, &c.

§ 873. TRUSTEES and *cestuis que trust* are the owners of the whole interest in the trust estate; and therefore, in suits in equity in relation to the estate by or against strangers, both the trustees and *cestuis que trust* must be parties representing that interest.<sup>1</sup> It is however held by the United States Supreme Court that in a suit by a stranger against a trustee

<sup>1</sup> *Biffeld v. Taylor*, 1 Moll. 198; *Adams v. St. Leger*, 1 B. & B. 184; *Dunn v. Seymour*, 3 Stockt. 220; *Sprague v. Tyson*, 44 Ala. 338; *White v. Haynes*, 33 Ind. 540; *Harris v. McBane*, 66 N. C. 334; 1 *Daniell*, Chan. Prac. 220, 221, 256 (4th Am. ed.); *Lauriat v. Stratton*, 6 Sawy. (U. S.) 339.

to defeat the trust altogether, the *cestui* is not a necessary party, if the powers and duties of the trustee are such that those for whom he acts will be bound by what is done against him as well as by what is done by him.<sup>1</sup> (a) Where a mort-

<sup>1</sup> *Vetterlein v. Barnes*, 124 U. S. 169.

(a) In *Kerrison v. Stewart*, 93 U. S. 155 (a creditor's suit), it was held that when a trustee is invested with such powers, and is under such obligations, that the beneficiaries are bound by what is done by him or against him, they are not necessary parties to a stranger's suit to defeat the trust. Waite, C. J., here said: "It cannot be doubted that, under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him as well as what is done for him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust: *Shaw v. Norfolk County R. Co.*, 5 Gray, 171; *Bifield v. Taylor*, 1 Beat. 91; *Campbell v. Railroad Co.*, 1 Woods, 376; *Ashton v. Atlantic Bank*, 3 Allen, 220; or to one by a stranger against him to defeat it in whole or in part. *Rogers v. Rogers*, 3 Paige, 379; *Wakefield v. Grover*, 4 Paige, 34; *Winslow v. Minnesota R. Co.*, 4 Minn. 313; *Campbell v. Watson*, 8 Ohio, 500.

In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party." See also *Frewen v. Frewen*, 60 L. T. 953; *Andrew v. Cooper*, 45 Ch. D. 444; *McArthur v. Scott*, 113 U. S. 340; *Smith v. Portland*, 30 F. R. 734; *Hickox v. Elliott*, 10 Sawyer, 415; *Roberts v. New York El. R. Co.*, 155 N. Y. 31; *Jewett v. Tucker*, 139 Mass. 566; *Northampton National Bank v. Crafts*, 145 Mass. 444; *Barrett v. Brown*, 86 N. C. 556; *Warren v. Howard*, 99 N. C. 190; *Harlow v. Mister*, 64 Miss. 25; *Van Bokkelen v. Tinges*, 58 Md. 53; *Brokaw v. Brokaw*, 41 N. J. Eq. 215; *Tucker v. Zimmerman*, 61 Ga. 599; *Hill v. Durand*, 50 Wis. 354; *Wier v. Simmons*, 55 Wis. 637. In general, a decree in a suit as to the title to land, in which the trustee and all living beneficiaries are parties, binds beneficiaries thereafter born. *Franklin S. Bank v. Taylor*, 53 F. R. 854. A trustee's mere refusal to sue does not entitle a *cestui que trust* to sue a third person in his own name, or to use the trustee's name, without an order therefor. *Sharpe v. San Paulo Brazilian Ry. Co.*, L. R. 8 Ch. 597. So a mere refusal by a legal personal representative to sue for outstanding assets does not, in the absence of

gage is made to A. in trust for B., the *cestui que trust* B. cannot file a bill for foreclosure without joining A., for the reason that A. is the only person who, on payment, can discharge the mortgage;<sup>1</sup> and where a contract was made to convey land to A. in trust for B., A. must join in a bill for a specific performance, as the legal estate must be conveyed to him.<sup>2</sup> So one of several *cestuis que trust* cannot bring a bill for foreclosure or for redemption without joining all the *cestuis que trust* interested in the mortgage or equity of redemption.<sup>3</sup> A mortgagee cannot foreclose without joining all his *cestuis que trust*; and a mortgagor in a bill to redeem must join all the *cestuis que trust* as defendants,<sup>4</sup> unless the mortgagee had created the trust for the purpose of perplex-

<sup>1</sup> Woods v. Williams, 4 Madd. 186; Scott v. Nicoll, 3 Russ. 476; Hichens v. Kelly, 2 Sm. & Gif. 264.

<sup>2</sup> Cope v. Parry, 2 J. & W. 588; Hobson v. Staneeer, 9 Mod. 83.

<sup>3</sup> Palmer v. Carlisle, 1 S. & S. 423; Lowe v. Morgan, 1 Bro. Ch. 368; Henley v. Stone, 3 Beav. 355; Martin v. Reed, 30 Ind. 218. The decree in *Montgomerie v. Bath*, 3 Ves. 560, was made by consent.

<sup>4</sup> Caverly v. Philp, 6 Madd. 229; Osbourn v. Fallows, 1 R. & M. 741; Wetherell v. Collins, 3 Madd. 255; Thomas v. Dunning, 5 De G. & Sm. 618; Whistler v. Webb, Bunb. 53; Anderson v. Stather, 2 Coll. 209; Coles v. Forest, 10 Beav. 557; Yates v. Hambly, 2 Atk. 237; Wilton v. Jones, 2 Y. & Col. Ch. 244; Drew v. Harman, 5 Price, 319.

special circumstances, justify a residuary legatee, or next of kin, in suing the legal personal representative and the debtor to the estate. *Yeatman v. Yeatman*, 7 Ch. D. 210. When the circumstances enable a *cestuis que trust* to sue in his own name, all the other *cestuis que trust* should be made defendants in order to prevent a multiplicity of suits. *Meldrum v. Scorer*, 56 L. T. 471. The creator of the trust is not a necessary party to a proceeding to remove the trustee. *De Peyster v. Beekman*, 55 How. Pr. 90; *Freeman v. Prendergast*, 94 Ga. 369.

But all the beneficiaries are. *Butler v. Butler*, 164 Ill. 171. So are remainder-men. *Elias v. Schwyer*, 43 N. Y. S. 55. To a bill in equity the *bona fide* assignee of the property in dispute is the real party in interest. *Cole v. Lake*, 54 N. H. 242; *Walker v. Brooks*, 125 Mass. 241. But when the assignment is fraudulent and colorable only, the assignee is not a necessary party to a suit to show a trust in the transferred property. *Shainwald v. Davids*, 69 F. R. 687; *Bull v. Odell*, 46 N. Y. S. 306.

ing the mortgagor.<sup>1</sup> So if A. grants an annuity to B., and conveys an estate to C. to secure it, he must join both B. and C. in a suit to set it aside.<sup>2</sup> So in suits by or against trustees for the payment of debts or for the payment of legacies, all the *cestuis que trust* must be joined and made parties, plaintiffs or defendants,<sup>3</sup> although a contrary rule has been laid down by high authority.<sup>4</sup> If the trusteeship is vacant, and the property and all the *cestuis que trust* are before the court, a valid decree binding the property can be made;<sup>5</sup> but in no case can a stranger to a trust maintain a suit for the administration of it.<sup>6</sup>

§ 874. If trustees enter into a contract without any reference to their *cestuis que trust*, as if they contract in their own names to purchase an estate, they may maintain or defend a suit in relation to it in their own names, although they in fact intended the contract for the benefit of the trust. If it does not appear on the face of the contract or otherwise that the trustees acted as agents or in a fiduciary character, it is unnecessary to go beyond the terms of the contract; and in many cases it would be improper to do so.<sup>7</sup> But

<sup>1</sup> Yates v. Hambly, 2 Atk. 237; Osbourn v. Fallows, 1 R. & M. 743.

<sup>2</sup> Bromley v. Holland, 7 Ves. 3; Butler v. Prendergast, 2 Bro. P. C. 170.

<sup>3</sup> Harrison v. Stewardson, 2 Hare, 530; Holland v. Baker, 3 Hare, 68; Thomas v. Dunning, 5 De G. & Sm. 618. Bondholders under a second mortgage holden by the same trustees are not necessarily parties to a bill in equity by the bondholders under the first mortgage, to require the trustees to take possession of the property. First Nat. Ins. Co. v. Salisbury, 130 Mass. 305. Trustees or directors of corporations represent the stockholders in all litigation, and the court will not dismiss an action commenced by the trustees on application made by parties who have become owners of a majority of the shares. Railway Co. v. Alling, 99 U. S. 463.

<sup>4</sup> Mitf. Eq. Plead., 174, 176 (4th ed.).

<sup>5</sup> White v. Sprague, 44 Ala. 338.

<sup>6</sup> White v. Haynes, 33 Ind. 540.

<sup>7</sup> White v. White, 4 M. & C. 460; Keon v. Magawley, 1 Dr. & W. 401; Tasker v. Small, 3 M. & C. 63; Humphreys v. Hollis, Jac. 73; Wakeman v. Rutland, 3 Ves. 233, 504; Linch v. Thomas, 27 Ill. 457; Brown v.

where trustees enter into contracts in their character as trustees, and in behalf of the trust estate, and for the benefit of the *cestuis que trust*, the *cestuis que trust*, for whose benefit the contract was made, ought to be parties to the suit.<sup>1</sup> A sale even by order of court will not bind children *in esse* not made parties.<sup>2</sup> In marriage articles and settlements, the husband and wife and all the issue are purchasers for a valuable consideration, and are parties to the contract; therefore they must be joined with the trustees in all suits in relation to the property.<sup>3</sup> A person may be appointed the agent or representative of others in such manner that he may sue and be sued alone, and without joining such other persons; but the intention to constitute such an absolute representative must very clearly appear.<sup>4</sup> Trustees are not such agents or representatives: they do not own the property beneficially, though the legal title is in them; they are in some sense the agents and representatives of the *cestuis que trust*; but they are not agents for the purpose of defending the property against the adverse claims of third persons without the knowledge and behind the backs of the real owners.<sup>5</sup> If trustees can sue in their own names, surviving trustees may generally maintain the actions in their names.<sup>6</sup>

§ 875. Where the suits are between the trustees and the *cestuis que trust* in relation to the property, the general rule is that all the trustees and all the *cestuis que trust* must be before the court, either as plaintiffs or defendants. (a)

Cherry, 56 Barb. 635; *Dix v. Akers*, 30 Ind. 431; *Rawlings v. Fuller*, 31 Ind. 234; 1 Dan. Ch. Prac. 230, 231 (4th Am. ed.).

<sup>1</sup> *Douglass v. Horsefall*, 2 S. & S. 184; *Hook v. Kinnear*, 2 Swanst. 417; *Small v. Atwood*, Younge, 457.

<sup>2</sup> *Covar v. Cantelon*, 25 S. C. 35.

<sup>3</sup> *Kirk v. Clark*, Pr. Ch. 275.

<sup>4</sup> *Vernon v. Blackerly*, 2 Atk. 145; *Bifield v. Taylor*, 1 Moll. 193; Beat. 91.

<sup>5</sup> *Holland v. Baker*, 3 Hare, 72.

<sup>6</sup> *Crocker v. Peals*, 1 Lowell, 416.

(a) When the trustee has an defendant in a suit in equity brought adverse interest, he may be made a by the *cestui que trust*. *Partee v.*

§ 876. Thus if the *cestuis que trust* bring a suit against the trustees, praying for relief, all the trustees ought to be made parties,<sup>1</sup> in order that, as each cotrustee is liable to the *cestuis que trust*, the court may do complete justice, so far as possible, by taking the accounts once for all, and by adjusting the liabilities of the codefendants, and thus obviate the necessity of ulterior proceedings and a multiplicity of suits.<sup>2</sup> (a) The cotrustees ought to be made parties (although

<sup>1</sup> *Munch v. Cockerell*, 8 Sim. 219; *Att. Gen. v. Wilson*, Cr. & Phil. 28; *Att. Gen. v. Newbury Corp.*, C. P. Coop. 77 (1837, 1838); *Walker v. Symonds*, 3 Swanst. 75; *In re Chertsey Market*, 6 Price, 278; *Humberstone v. Chase*, 2 Y. & Col. 213; *Perry v. Knott*, 4 Beav. 179; *Tarleton v. Hornby*, 1 Y. & Col. 336; *Wilson v. Moore*, 1 M. & K. 127; *Fowler v. Reynal*, 2 De G. & Sm. 749; *Willie v. Ellice*, 6 Hare, 505; *Heath v. Erie R. R. Co.*, 8 Blatch. 347.

<sup>2</sup> *Jones v. Jones*, 3 Atk. 112; *Shipton v. Rawlins*, 4 Hare, 623; *Latouche v. Dunsany*, 1 Sch. & Lef. 137; 2 id. 690; *Walker v. Preswick*, 2 Ves. 622; *Conry v. Caulfield*, 2 B. & B. 255; *Farquharson v. Seton*, 5 Russ. 45; *Ex parte Shakeshaft*, 3 Bro. Ch. 197; *Taylor v. Tabrum*, 6 Sim. 281; *Fletcher v. Green*, 33 Beav. 426; *Ex parte Angle*, Barn. 425; *Wilson v. Moore*, 1 M. & K. 146; *Lyse v. Kingdom*, 1 Col. C. C. 188; *Richardson v. Jenkins*, 1 Drew. 477; *Alleyne v. Darcy*, 4 Ir. Eq. 206; *Jenkins v. Robinson*, 1 Eq. R. 123; *Rehden v. Wesley*, 29 Beav. 215; *Birls v. Betty*, 6 Madd. 90; *Lawrence v. Bowle*, 2 Phil. 140; 1 C. P. Coop. t. Cott. 241; *Pitt v. Bonner*, 1 Y. & Col. Ch. 670; *Lockhart v. Reilly*, 1 De G. & J. 464; *Priestman v. Tyndall*, 24 Beav. 244; *Lingard v. Bromley*, 1 Ves. & B. 114; *Coppard v. Allen*, 2 De G., J. & S. 173.

*Thomas*, 11 F. R. 769; *Webb v. Norris v. Hassler*, 22 F. R. 401. *Vermont Central R. Co.*, 9 id. 793; So, beneficiaries under a will, having common grounds of relief, see *Gandy v. Gandy*, 30 Ch. D. 57; *Barrett v. Brown*, 86 N. C. 556.

(a) Every beneficiary should be a party to an accounting in equity by the trustee. *Alison v. Goldtree*, 117 Cal. 545; *Biron v. Scott*, 80 Wis. 206; *Speakman v. Tatem*, 45 N. J. Eq. 388. Beneficiaries, having separate interests in a trust fund, may join as plaintiffs in a bill against the trustee for an account as to their respective interests. *Ketchum v. Packer*, 65 Conn 544; though owning in severalty, may join as plaintiffs in a bill for the removal of a trustee. *Gartside v. Gartside*, 113 Mo. 348. A *cestui que trust* is not a necessary party to a bill by a trustee to foreclose a mortgage. *Dodge v. Tulleys*, 144 U. S. 451; *Richter v. Jerome*, 123 U. S. 233. In England, see *Goldsmid v. Stonehewer*, 9 Hare, App. 38; *Francis v. Harrison*, 43 Ch. D. 183; *Criffith v. Pound*, 45 Ch. D. 553; *Re*

the equities between themselves cannot be adjusted), for the reason that the decree of relief to the *cestuis que trust* is the foundation of the relief to the cotrustees *inter sese*; and if any of the trustees are not parties to the first suit by the *cestuis que trust*, they will not be bound by the decree, and the whole subject-matter will of course come under litigation for the second time.<sup>1</sup> But a person named as trustee need not be joined if he has disclaimed the office,<sup>2</sup> or has been discharged. So if the breach of trust is in the nature of a tort, for which there could be no contribution as between the defaulting trustees, they need not all be joined as defendants in a bill for the breach.<sup>3</sup>

§ 877. If the trustees commit a breach of trust, and third persons obtain the benefit of it, they must be joined as defendants in a suit by the *cestuis que trust*.<sup>4</sup> If the trustees

<sup>1</sup> Perry v. Knott, 4 Beav. 180; Eccleston v. Skelmersdale, 1 Beav. 396; Cottingham v. Shrewsbury, 3 Hare, 627; Lennard v. Curzon, 1 De G. & Sm. 350; Payne v. Parker, L. R. 1 Ch. 327.

<sup>2</sup> Wilkinson v. Parry, 4 Russ. 274; Creed v. Creed, 2 Hog. 215; Richardson v. Hulbert, 1 Anst. 65; Hubbell v. Hubbell, 22 Ohio St. 208.

<sup>3</sup> Heath v. Erie R. R. Co., 8 Blatch. 347; Cunningham v. Pell, 5 Paige, 607.

<sup>4</sup> Burt v. Bennett, 2 Bro. Ch. 225; Cousett v. Bell, 1 Y. & Col. Ch. 569;

Mitchell, 65 L. T. 851; *Re Booth*, L. R. 8 Eq. 7; L. R. 5 Ch. 763; 67 id. 550. In *Wavell v. Mitchell*, Heath v. Erie Ry. Co., 8 Blatch. 65 L. T. 851; W. N., (1892) 11, the 347, 411; *Boyd v. Gill*, 21 id. 543; *Stockton v. Anderson*, 40 N. J. Eq. 486. The trustee under a railroad deed of trust is not a necessary party to a bondholder's suit to compel performance of the railroad's agreements in the deed. *Spies v. Chicago &c. R. Co.*, 30 F. R. 397. But the trustee under a railroad income mortgage is a necessary party to a suit against the railroad for an accounting and injunction. *Barry v. Missouri, K. & T. Ry. Co.*, 22 F. R. 631.

Joint trustees are all to be made parties in matters of account. *Howth v. Owens*, 29 F. R. 722; *Connelly v. Wells*, 33 id. 205. When a *cestui que trust* sues in equity for a breach of trust by the trustees, he may sue any or all of them at his election, the wrong being several as well as joint. *Land Credit Co. v. Fermoy*,

convey the property to a third person with notice of the trust, or without consideration, such third person may be sued by the *cestuis que trust*, and must be joined with the trustees in a suit for relief by the *cestuis que trust*.<sup>1</sup> (a) But if such third person has received a conveyance without notice, and has conveyed away the estate for a valuable consideration not paid to himself, he need not be joined in the suit; for, having no notice of the trust, he cannot be made personally liable, and having none of the trust property or its proceeds in his hands, it cannot be attached or reached through him.<sup>2</sup> So if a third person purchases the trust property for a valuable consideration, and without notice expressed or implied, he need not be made a party, for the reason that no relief can be had against him.<sup>3</sup> If a cotrustee has deceased, his representatives need not be joined if they have had nothing to do with the trust;<sup>4</sup> and so if the plaintiff waives all relief

*Perry v. Knott*, 4 Beav. 179; 5 Beav. 297; *Williams v. Allen*, 29 Beav. 292. But see *Pearse v. Hewitt*, 7 Sim. 471; *Vanderhende v. Livingston*, 3 Swanst. 625; *Trafford v. Boehm*, 3 Atk. 440; *Fuller v. Knight*, 6 Beav. 205; *Heath v. Erie R. R. Co.*, 8 Blatch. 347.

<sup>1</sup> *Ibid.*; *Montford v. Cadogan*, 17 Ves. 485; *Salomans v. Laing*, 12 Beav. 377; *Hanson v. Worthington*, 12 Md. 418; *Abbott v. Reeves*, 49 Pa. St. 494; *Hutchinson v. Reid*, Hoff. Ch. 317; *Bailey v. Inglee*, 2 Paige, 278; *Bush v. Bush*, 3 Strob. Eq. 377; *Lund v. Blanshard*, 4 Hare, 28, and n.; *Meyer v. Montriou*, 9 Beav. 521; *Western R. R. Co. v. Nolan*, 48 N. Y. 517.

<sup>2</sup> *Knye v. Moore*, 1 S. & S. 61; *Harrison v. Pryse*, Barn. 324.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Glass v. Oxenham*, 2 Atk. 121; *Slater v. Wheeler*, 9 Sim. 156; *Routh v. Kinder*, 3 Swanst. 144, n.; *Beattie v. Johnstone*, 8 Hare, 169; *Simes v. Eyre*, 6 Hare, 137.

(a) *McBride v. McIntyre*, 91 Mich. 406. A stakeholder, who still holds the fund in dispute, should be a party to a suit relating to its disposition. *Perrin v. Lepper*, 26 F. R. 545. An auctioneer who holds a large deposit, which is involved in the suit, is a proper party defendant to a bill for specific performance, but the practice of joining, in such a bill, auctioneers who hold but a small deposit, is not favored. *Egmont v. Smith*, 6 Ch. D. 469. See *Dickson v. Harrison*, 9 Ch. D. 243; *Amos v. Herne Bay P. & C. Co.*, 54 L. T. 264; *Tavener v. Barrett*, 21 W. Va. 656, 673.



that he might have by joining them.<sup>1</sup> If the suit does not seek to charge the trustees personally, and one of them dies during its progress, his representatives need not be brought before the court, as the trusteeship survives in the remaining trustees.<sup>2</sup> So the representatives of a deceased trustee, who was not a party to a breach of trust, need not be made parties to a suit to remedy the breach.<sup>3</sup> But the representatives of a deceased cotrustee are liable to the extent of assets received by them, for a breach of trust committed in his lifetime, and they may all be joined that their relative rights may be ascertained in the suit.<sup>4</sup>

§ 878. If a trustee is out of the jurisdiction, or if he can not be served with process after diligent search, or if for any reason he cannot be compelled to appear, the court will allow the suit to proceed so far as it can in the absence of such trustee.<sup>5</sup> (a) In a suit to adjudicate the rights of parties to an estate, the trustee of an outstanding term need not be a party,<sup>6</sup> and where a trustee has died insolvent, his represen-

<sup>1</sup> *Selyard v. Harris*, 1 Eq. Cas. Ab. 74; *Moore v. Blake*, 1 Moll. 284.

<sup>2</sup> *London Gas Light Co. v. Spottiswood*, 14 Beav. 271.

<sup>3</sup> *Simes v. Eyre*, 6 Hare, 137.

<sup>4</sup> *Lyse v. Kingdom*, 1 Col. C. C. 184; *Knatchbull v. Fearnhead*, 3 M. & Cr. 122; *Pharis v. Leachman*, 20 Ala. 683; *Kirkman v. Booth*, 11 Beav. 273; *White v. Commonwealth*, 39 Penn. St. 167; *Beattie v. Johnstone*, 8 Hare, 177; *Hall v. Austin*, 10 Jur. 452; 2 Col. C. C. 570; *Penny v. Penny*, 9 Hare, 39; *Haldenby v. Spofforth*, 9 Beav. 195; *Richardson v. Jenkins*, 1 Drew. 477.

<sup>5</sup> *Morrill v. Lawson*, 2 Eq. Cas. Ab. 167; *Whalley v. Whalley*, 1 Vern. 487; *Cowstad v. Cely*, Pr. Ch. 83; *Butler v. Prendergast*, 2 Bro. P. C. 170; *Moore v. Vinten*, 12 Sim. 161; *Heath v. Percival*, 2 Eq. Cas. Ab. 167; 1 P. Wms. 683.

<sup>6</sup> *Brooke v. Burt*, 1 Beav. 106.

(a) One appointed trustee in one State may bring suit in another State to protect the trust property. *Pennington v. Smith*, 69 F. R. 188. See *Toronto G. T. Co. v. Chicago, &c. R. Co.*, 4 N. Y. S. 726. So foreign trustees may foreclose a mortgage acquired after their testator's death, although they do not record a copy of his will in the State where the land lies. *Bradford v. King*, 18 R. I. 743. See *Dorsey v. Banks*, 88 Iowa, 595.

tatives need not be made parties.<sup>1</sup> But if an insolvent trustee is living, he must be brought before the court.<sup>2</sup> An intermediate trustee of a mere equity need not be made a party unless there are some peculiar circumstances.<sup>3</sup> So where a trustee has properly conveyed all his interest to a third person upon the same trusts.<sup>4</sup> So where a mortgagor conveyed his equity of redemption to trustees by a voluntary and revocable instrument, it was held that the mortgagor so far represented the estate that the trustees need not be made parties to a foreclosure suit.<sup>5</sup> So suits have been allowed to be maintained, though the trustees were not joined, where they had no interest, and the *cestuis que trust* undertook for the trustee that the decree should be final and effectual. But these are anomalous cases.<sup>6</sup> If a *cestuis que trust* makes a new settlement of the trust fund upon new trustees, and they commit a breach of trust, the *cestuis que trust* under the new settlement may have relief against the new trustees without joining the old ones, although they are implicated in the wrong.<sup>7</sup> (a)

<sup>1</sup> Seddon v. Connel, 10 Sim. 85; Madox v. Jackson, 3 Atk. 406; De-  
vaynes v. Robinson, 24 Beav. 98. But see Hayward v. Ovey, 6 Madd.  
113.

<sup>2</sup> Hayward v. Ovey, 6 Madd. 113; Thorpe v. Jackson, 2 Y. & Col. 560.

<sup>3</sup> Scully v. Scully, 3 Ir. Eq. 494; Head v. Teynham, 1 Cox, 57; Munch  
v. Cockerell, 8 Sim. 219; Malone v. Geraghty, 2 Conn. & Laws. 249;  
Whittle v. Halliday, id. 430; Horrocks v. Ledsam, 2 Col. C. C. 208; Nel-  
son v. Seaman, 6 Jur. (N. S.) 258.

<sup>4</sup> Bromley v. Holland, 7 Ves. 11; Knye v. Moore, 1 S. & S. 65; Reed  
v. O'Brien, 7 Beav. 32.

<sup>5</sup> Slade v. Rigg, 3 Hare, 35.

<sup>6</sup> Kirk v. Clark, Pr. Ch. 275.

<sup>7</sup> Dew v. McGachen, 15 Beav. 84.

(a) If a court of equity removes a trustee and appoints a new one, to whom the former turns over the trust funds, beneficiaries who are not made parties may treat this as a wrongful diversion. Butler v. Butler, 164 Ill. 171.

When a successor has not been appointed to a trustee who has resigned, the *cestui que trust* may sue to protect the trust property. Zimmerman v. Makepeace (Ind.), 52 N. E. 992.

§ 879. If a person holding a fiduciary relation is guilty of something more than a mere breach of trust or of civil obligation, as if he commits a *tort* or *delictum*, or a fraudulent or criminal act, he may be pursued alone, and his cotrustees need not be joined, nor even his confederates in the wrong.<sup>1</sup>

§ 880. The husband of a *feme covert* trustee is responsible, in the absence of statute exemptions, for breaches of trust committed by his wife before marriage as well as after, and he should be joined in the suit.<sup>2</sup>

§ 881. As a general rule, all the *cestuis que trust* must be before the court, in order that the rights of all parties in interest may be ascertained, and future litigation avoided; and this rule should be followed in all cases except when there has been a breach of trust with fraudulent intent. The trustees ought not to be twice vexed where it is possible to determine all the rights of the parties in one suit.<sup>3</sup> But a bill by a part of the *cestuis que trust* ought not to be dismissed, but it should stand for amendment and for summoning in of other parties.<sup>4</sup> *Cestuis* who will not join as plaintiffs should be made defendants.<sup>5</sup>

<sup>1</sup> Lingard *v.* Bromley, 1 V. & B. 117; Seddon *v.* Connel, 10 Sim. 86; Att. Gen. *v.* Wilson, 1 Cr. & Ph. 28; Walburn *v.* Ingilby, 1 M. & K. 77; Charity Corp. *v.* Sutton, 2 Atk. 406; Att. Gen. *v.* Brown, 1 Swanst. 265; Cunningham *v.* Pell, 5 Paige, 612; Gilchrist *v.* Stevenson, 9 Barb. 9; Miller *v.* Fenton, 11 Paige, 18.

<sup>2</sup> Palmer *v.* Wakeford, 3 Beav. 227; Moon *v.* Henderson, 4 Des. 459; Carroll *v.* Connet, 2 J. J. Marsh. 195; Elliott *v.* Lewis, 3 Edw. Ch. 40; Redwood *v.* Riddick, 4 Munf. 222.

<sup>3</sup> Pyncent *v.* Pyncent, 3 Atk. 571; Morrill *v.* Lawson, 2 Eq. Cas. Ab. 167; Manning *v.* Thesiger, 1 S. & S. 107; Adams *v.* St. Leger, 1 B. & B. 181; Hanne *v.* Stevens, 1 Vern. 110; Court *v.* Jeffery, 1 S. & S. 105; Phillipson *v.* Gatty, 6 Hare, 26; Josling *v.* Karr, 3 Beav. 495; Piatt *v.* Oliver, 2 McLean, 307; McKinley *v.* Irvine, 13 Ala. 682; Cassiday *v.* McDaniel, 8 B. Mon. 519; Munch *v.* Cockerell, 8 Sim. 219, 231; Cunningham *v.* Pell, 5 Paige, 612.

<sup>4</sup> Howard *v.* Gilbert, 39 Ala. 726.

<sup>5</sup> Martin *v.* Parnell, 4 Del. Ch. 249.

§ 882. But if a *cestui que trust* has assigned all his interest to a third person, so that he has nothing, he need not be made a party;<sup>1</sup> or if a *cestui que trust* is entitled to a distinct and aliquot share of an ascertained fund, he may maintain a bill against the trustees for that share without joining the *cestuis que trust* of the remaining fund.<sup>2</sup> This practice, however, is not encouraged,<sup>3</sup> and if the fund is not certain, but is to be ascertained by an account, all the *cestuis que trust* interested in it must be made parties.<sup>4</sup>

§ 883. If a *cestui que trust* is absent, and all the means of compelling him to appear have been exhausted, the suit may proceed in his absence.<sup>5</sup> So if he is a merely passive party, and the disposition of the property is within the power of those before the court.<sup>6</sup> But if the primary object of the bill is to affect the right of the absent *cestui que trust*, or to charge it with debts or liens, the court will not make a decree in his absence, although the *legal* title is in the parties before the court.<sup>7</sup> In such cases decrees have been made, reserving the right of the absent *cestui que trust* to apply to have it amended,<sup>8</sup> or conveyances have been ordered without prejudice to the rights of *cestuis que trust* who could not be found.<sup>9</sup>

§ 884. Where some of the trustees have committed a breach of trust, a suit may be maintained against them by

<sup>1</sup> Goodson v. Ellison, 3 Russ. 583.

<sup>2</sup> Smith v. Snow, 3 Madd. 10; Perry v. Knott, 5 Beav. 293; Hughson v. Cookson, 3 Y. & Col. 378; Hutchinson v. Townsend, 2 Keen, 675; Hunt v. Peacock, 11 Jur. 555; Sandford v. Jodrell, 2 Sim. & Gif. 176; Montgomerie v. Bath, 3 Ves. Jr. 560; Piatt v. Oliver, 2 McLean, 307.

<sup>3</sup> Ibid.

<sup>4</sup> Lenaghan v. Smith, 2 Phil. 301; Alexander v. Mullins, 2 R. & M. 568; Eldridge v. Putnam, 46 Wis. 205.

<sup>5</sup> Downs v. Thomas, 7 Ves. 206; Phillips v. Buckingham, 1 Vern. 228.

<sup>6</sup> Rogers v. Linton, Bunb. 200; Willats v. Busby, 5 Beav. 193.

<sup>7</sup> Brown v. Blount, 2 R. & M. 83; Holmes v. Bell, 2 Beav. 298; Pell v. Brown, 2 Bro. Ch. 276; Willats v. Busby, 5 Beav. 193.

<sup>8</sup> Att. Gen. v. Baliol Coll., 9 Mod. 407.

<sup>9</sup> Willats v. Busby, 5 Beav. 193.

their *cotrustees* for restoration of the property, without joining the *cestuis que trust*, except upon a final accounting, although they also may have a suit for the breach of trust. This rule has been established and acted upon by reason of its great convenience;<sup>1</sup> but where some of the *cestuis que trust* have procured or concurred in a breach of the trust by some of the trustees, such *cestuis que trust* must be joined in a suit for the correction of the wrong.<sup>2</sup>

§ 885. Where the parties in interest are so numerous that it is not possible or convenient to join all as plaintiffs, the court will allow a few *cestuis que trust* to sue in behalf of themselves and the others;<sup>3</sup> so a small number may be made defendants as representatives of all the others for the purpose of determining their rights;<sup>4</sup> but in such cases all the trustees must be joined.<sup>5</sup> (a) If all the *cestuis que trust* must

<sup>1</sup> *Franco v. Franco*, 3 Ves. 75; *Bridgman v. Gill*, 24 Beav. 302; *Peake v. Ledger*, 4 De G. & Sm. 137; *Wood v. Brown*, 34 N. Y. 337; *McGregor v. McGregor*, 35 N. Y. 218; *Hughes v. Key*, 20 Beav. 395; *Groom v. Booth*, 1 Dr. 657; *May v. Selby*, 1 Y. & Col. Ch. 235; *Baynard v. Woolley*, 20 Beav. 583; *Noble v. Meymott*, 14 Beav. 471; *Horsely v. Fawcett*, 11 Beav. 565; *Bridget v. Himes*, 1 Coll. 72; *Meyer v. Montrion*, 9 Beav. 521.

<sup>2</sup> *Jesse v. Bennett*, 6 De G., M. & G. 609. But see *Meyer v. Montrion*, 9 Beav. 521; *Greenwood v. Wakeford*, 1 Beav. 576; *Payne v. Collier*, 1 Ves. Jr. 170; *Fuller v. Knight*, 6 Beav. 205; *Dew v. McGachen*, 15 Beav. 84; *Shook v. Shook*, 19 Barb. 653; *Abbott v. Reeves*, 49 Penn. St. 494; *Jacob v. Lucas*, 1 Beav. 436; *Griffith v. Vanheythuysen*, 9 Hare, 85; *Hall v. Lock*, 2 Y. & C. Ch. 631.

<sup>3</sup> *Bromley v. Smith*, 1 Sim. 8; *Weld v. Bonham*, 2 S. & S. 91; *Lloyd v. Loaring*, 6 Ves. 773; *Taylor v. Salmon*, 4 M. & C. 134; *Walworth v. Holt*, id. 619; *Cockburn v. Thompson*, 16 Ves. 321; *Preston v. Grand, &c. Dock Co.*, 11 Sim. 327; *Att. Gen. v. Heelis*, 2 S. & S. 67; *Chaney v. May*, Pr. Ch. 529; *Manning v. Thesiger*, 1 S. & S. 106; *Harvey v. Harvey*, 4 Beav. 215; *Hickens v. Congreve*, 4 Russ. 562; *William v. Salmond*, 2 K. & J. 463; 1 Dan. Ch. Prac. 256 (4th Am. ed.).

<sup>4</sup> *Adair v. New River Co.*, 11 Ves. 429, 443-445; *City of London v. Richmond*, 2 Vern. 421; *Meux v. Maltby*, 2 Swanst. 277; *Milbank v. Collier*, 1 Coll. 237; *Harvey v. Harvey*, 4 Beav. 215; 5 Beav. 134; *Bunnett v. Foster*, 7 Beav. 540.

<sup>5</sup> *Holland v. Baker*, 3 Hare, 68.

(a) See 1 Dan. Ch. Prac. (6th T. Co. v. Lake St. El. R. Co., 68 Am. ed.), 243, n. (a); *Farmers' L. & Ill. App.* 666.

join in a conveyance, they should all join in the suit, otherwise the litigation might be futile; but in the absence of any, the court will proceed to bind the rights of all if possible.<sup>1</sup> In order that a few may sue, or be sued, in behalf of a large number, it must appear that all have the same beneficial interest; for if they have different or conflicting interests, they must all be brought before the court, in order that their separate interests may be adjusted.<sup>2</sup> How large the number must be in order to dispense with calling them all before the court has never been determined. Where there were twenty-one *cestuis que trust*, the court required them all to be joined;<sup>3</sup> but in one case where the *cestuis que trust* were twenty-six in number, and in another twenty-seven, and bills were filed nearly twenty years after the institution of the trusts, a few were allowed to maintain bills in behalf of the whole for the execution of the trusts.<sup>4</sup>

§ 886. If a *cestui que trust* desires to bring a suit against a stranger, he should apply to the trustee to allow his name to be used as complainant, and the trustee is bound to comply, on being indemnified against the costs. If the trustee refuses improperly, he may be made a defendant, and will be deprived of his costs, or he may be ordered to pay costs.<sup>5</sup> If the trustee is in no default, he may have his costs. If the trustees and *cestuis que trust* are sued by a stranger, they ought to join in their answer and defence. The court has no means of compelling them to join; but if they split in their defence, only one set of costs will be allowed

<sup>1</sup> *Meux v. Maltby*, 2 Swanst. 285; *Powell v. Wright*, 7 Beav. 449.

<sup>2</sup> *Att. Gen. v. Heelis*, 2 S. & S. 76, and cases cited; *T. & R.* 297; *Gray v. Chaplin*, 2 S. & S. 267; *Bainbridge v. Burton*, 2 Beav. 539; *Long v. Yonge*, 2 Sim. 385; *Richardson v. Larpent*, 2 Y. & Col. Ch. 507; *Newton v. Egmont*, 4 Sim. 574; 5 Sim. 130, 137; *Evans v. Stokes*, 1 Keen, 24; 1 Dan. Ch. Prac. 242 (4th Am. ed.).

<sup>3</sup> *Harrison v. Stewardson*, 2 Hare, 533.

<sup>4</sup> *Smart v. Bradstock*, 7 Beav. 500; *Bateman v. Margerison*, 6 Hare, 496.

<sup>5</sup> *Reade v. Sparkes*, 1 Moll. 8; *Hughes v. Key*, 20 Beav. 395. *Browne v. Lockhart*, 10 Sim. 426, seems to be contrary, but is doubted.

against the plaintiff, and they may have to bear their own costs.<sup>1</sup>

§ 887. In suits between *cestuis que trust inter se*, or *cestuis que trust* and trustees, all the parties in the same interest, whether *cestuis que trust* or trustees, should join, either as plaintiffs or defendants.<sup>2</sup>

§ 888. Trustees ought always to join in their answer; if they separate in their defence, only one set of costs will be given,<sup>3</sup> which will be divided equally if both trustees are in fault,<sup>4</sup> but if only one trustee is in fault the costs will be given to the trustee who is without fault.<sup>5</sup> But if there is good reason for severing in their defence, as where one trustee has a separate or personal interest independent of the others, or where they reside at such a distance that it is impossible for them to act together, or where any proper reasonable ground exists, the trustees will be allowed to answer severally, and each one may be allowed his costs.<sup>6</sup> If some of the trustees are properly made plaintiffs and others defendants, in order to settle the rights of the parties, each may have costs; but if one is made defendant

<sup>1</sup> Reade v. Sparkes, 1 Moll. 10; Woods v. Woods, 5 Hare, 229; Farr v. Sherriffe, 4 Hare, 528; Van Sandau v. Moore, 1 Russ. 441, reversing 2 S. & S. 509; Cuddy v. Waldron, 1 Moll. 14; Homan v. Hague, id.; Galway v. Butler, id. 13.

<sup>2</sup> Hosking v. Nicholls, 1 Y. & Col. Ch. 478.

<sup>3</sup> Nicholson v. Falkiner, 1 Moll. 559; Gaunt v. Taylor, 2 Beav. 347; Shovelton v. Shovelton, 32 Beav. 143.

<sup>4</sup> Course v. Humphrey, 26 Beav. 402; Att. Gen. v. Wyville, 28 Beav. 464.

<sup>5</sup> Young v. Scott, 1 Jones, Ir. Exch. 71; Att. Gen. v. Cuming, 2 Y. & Col. Ch. 156; Webb v. Webb, 16 Sim. 55; Cummins v. Bromfield, 3 Jur. (N. S.) 657.

<sup>6</sup> Gaunt v. Taylor, 2 Beav. 346; Aldridge v. Westbrook, 4 Beav. 212; Cummins v. Bromfield, 3 Jur. (N. S.) 657; Dudgeon v. Cormley, 2 Conn. & Laws. 422; Nicholson v. Falkiner, 1 Moll. 560; Wiles v. Cooper, 9 Beav. 294; Farr v. Sherriffe, 4 Hare, 528; Barry v. Woodham, 1 Y. & Col. 538, and cases cited; Reade v. Sparkes, 1 Moll. 10; Kempf v. James, C. P. Coop. 13, 1837, 1838; Walsh v. Dillon, 1 Moll. 13.

by reason of his misconduct, costs will not be allowed to him.<sup>1</sup>

§ 889. A *feme covert*, entitled to sue for her separate estate, cannot join with her husband, if he sets up any adverse claim or interest. In such case, she must sue by her next friend, and make her husband a defendant, and he will be entitled to his costs.<sup>2</sup> The same rule applies in relation to the execution of a power by a married woman.<sup>3</sup> But if the husband has no separate or adverse interest, he may be joined with the wife as coplaintiff.<sup>4</sup> If a married woman is sued in respect to her separate estate, she may obtain an order to answer separately;<sup>5</sup> but the mere fact that a woman is lying apart from her husband does not entitle her to answer separately.<sup>6</sup>

§ 890. If a bill is filed for an account, and the plaintiff seeks relief against wilful default of the trustees, he must allege in his bill some specific act of wilful misconduct,<sup>7</sup> and pray consequential relief; and at the hearing he must prove the act alleged, or at least establish a case for inquiry.<sup>8</sup> (a) If, at the hearing, the common accounts only are directed, it is too late to ask relief, on a hearing for further directions, against any wilful act that may appear accidentally from

<sup>1</sup> Hughes v. Key, 20 Beav. 395.

<sup>2</sup> Thorby v. Yates, 1 Y. & Col. Ch. 438; 1 Dan. Ch. Prac. 89, 90, 178-189 (4th Am. ed.)

<sup>3</sup> Hope v. Fox, 1 John. & H. 456.

<sup>4</sup> Beadmore v. Gregory, 2 Hem. & Mil. 491.

<sup>5</sup> Norris v. Wright, 14 Beav. 303.

<sup>6</sup> Garey v. Whittingham, 5 Beav. 270; Barry v. Woodham, 1 Y. & Col. 538.

<sup>7</sup> Bond v. McWatty, 14 Ir. Eq. 74.

<sup>8</sup> Sleight v. Johnson, 3 K. & J. 292.

(a) "A trustee is obviously under bill by the *cestui que trust* against an obligation to account with his trustee is never a bill for an *cestui que trust* for the trust property account in point of jurisdiction." or its income; but this obligation is Dean C. C. Langdell, in 2 Harv. L. merely equitable, and therefore a Rev. 266.



other inquiries;<sup>1</sup> and a trustee cannot be declared liable for wilful default upon a common order made at chambers for the administration of the trust estate.<sup>2</sup> But if a bill prays for an account with *interest*, and at the original hearing an account is directed, and in the course of taking the accounts improper balances appear to have been retained, interest on the balances may be asked for at the hearing for further directions.<sup>3</sup> And if relief against a breach of trust is prayed for, and at the original hearing the usual accounts only are directed, but with an inquiry as to who are the parties interested, it is not too late to ask relief against the breach of trust on the hearing for further directions, as before that time the court cannot deal with the question.<sup>4</sup> In a redemption suit it is not necessary that the plaintiff should charge wilful default; nor is the case altered if the deed, though in substance a security, is in form a deed of trust.<sup>5</sup> The general rule is, that a plaintiff who seeks to charge a trustee with a breach of trust is bound to state a clear case upon his bill. Therefore acts of a trustee which may, or may not, be breaches of trust must be so alleged that they necessarily appear to be breaches, or a demurrer will be sustained.<sup>6</sup> The presumption is in favor of the performance of his duty by the trustee; the plaintiff must therefore allege and prove affirmatively a breach of the trust.<sup>7</sup> The trustee will not be liable for breaches of trust not alleged in the bill.<sup>8</sup> But if the trustee commits breaches of trust of the same nature as those alleged in the bill, relief may be given against them

<sup>1</sup> *Coope v. Carter*, 2 De G., M. & G. 292.

<sup>2</sup> *Re Fryer*, 3 K. & J. 317; *Partington v. Reynolds*, 4 Drew. 253; *Re Delavante*, 6 Jur. (N. S.) 118; *Brooker v. Brooker*, 3 Sim. & Gif. 475.

<sup>3</sup> *Shaw v. Turbett*, 13 Ir. Eq. 476.

<sup>4</sup> *Pattenden v. Hobson*, 1 Eq. R. 28.

<sup>5</sup> *O'Connel v. O'Callagan*, 15 Ir. Eq. 31.

<sup>6</sup> *Att. Gen. v. Norwich*, 2 M. & Cr. 406, 422; *Maccubbin v. Cromwell*, 7 G. & J. 157; *McGinn v. Shaeffer*, 7 Watts, 412; *Dial v. Dial*, 21 Tex. 529.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Smith v. Smith*, 4 Johns. Ch. 45; *Cooper v. Cooper*, 1 Halst. Ch. 9.

without an amendment to the bill.<sup>1</sup> A bill brought by creditors of A. to hold an income which might be used for the support of A.'s son, so far as reasonably needful for that purpose, and which does not show the amount of the income, nor what is needed for said purpose, is insufficient. The facts must be stated on which a judgment can be formed as to existence of a surplus.<sup>2</sup>

§ 890 a. In a contest between two sets of trustees, if no damage to beneficiaries is alleged, equity will not grant an injunction but will leave the parties to a *quo warranto*.<sup>3</sup> Ejectment should be brought by the trustee where there is one in being holding the title in remainder;<sup>4</sup> but if the trustee is dead, a *cestui* entitled to the possession may bring ejectment against a stranger without title, and where a *cestui* is wrongfully kept out of possession by the trustee, he may bring ejectment even against the trustee; this is Georgia law.<sup>5</sup> But the general rule is that only the person holding the legal title can bring ejectment;<sup>6</sup> and when necessary for the *cestui* to sue at law to protect the trust property he should bring the action in the name of the trustee.<sup>7</sup> The trustee cannot in general bring ejectment against the *cestui* in possession,<sup>8</sup> nor in any case where the facts raise a presumption that he has surrendered the legal title to the *cestui*. Whether he can bring this action against the grantor in a deed of trust in the nature of a mortgage, *quære*.<sup>9</sup>

<sup>1</sup> *Harrison v. Mock*, 10 Ala. 196; *Coope v. Carter*, 2 De G., M. & G. 292; *Sleight v. Johnson*, 3 K. & J. 292.

<sup>2</sup> *Phelps v. Phelps*, 145 Mass. 416, 419.

<sup>3</sup> *Harris v. Pounds*, 64 Ga. 121.

<sup>4</sup> *Ford v. Cook*, 73 Ga. 215.

<sup>5</sup> *Glover v. Stamps*, 73 Ga. 209.

<sup>6</sup> *Siemers v. Schrader*, 88 Mo. 23.

<sup>7</sup> *Com'rs of Somerville v. Johnson*, 36 N. J. Eq. 211.

<sup>8</sup> *Id.*; *Donthitt v. Stinson*, 73 Mo. 199.

<sup>9</sup> *Davis v. Bessehl*, 88 Mo. 439.

## CHAPTER XXX.

## COSTS.

- § 891. Costs as between strangers and trustees.
- § 892. Costs are under the control of courts of equity.
- § 893. Therefore no general rule can be stated.
- § 894. Trustees who faithfully perform their duty may generally have their costs as between solicitor and client.
- § 895. If the trustee is a solicitor he can make no charge for professional services; but the court will order costs to be taxed in the usual manner and leave the proper officer to apply them.
- § 896. Where suits are brought to create a trust fund, the trustees may be ordered to pay costs, or they will be allowed costs only as between party and party.
- § 897. Where a trustee neglects to appear or to ask for his costs.
- § 898. Where a trustee may have his costs, although the decree is against him.
- § 899. Trustees may have their costs, whether plaintiffs or defendants.
- §§ 900, 901. Where the trustees are in fault, they cannot have costs.
- § 902. If trustees commit a breach of trust, they must pay the costs of correcting it.
- § 903. If trustees are refused their costs, or are ordered to pay costs, they cannot have an allowance for them in their accounts.
- § 903 *a*. Out of what fund costs will be decreed.

§ 891. THE general rule is, that if trustees bring suits against strangers, or strangers bring suits against trustees respecting the trust fund, costs will be awarded against the losing party, as in other suits.<sup>1</sup>(*a*) The rule, however, is

<sup>1</sup> *Westley v. Williamson*, 2 Moll. 458; *Burgess v. Wheate*, 1 Ed. 251; *Edwards v. Harvey*, G. Coop. 40; *Hill v. Magan*, 2 Moll. 46; *Elsev v. Lutyens*, 8 Hare, 164; *Dunlop v. Hubbard*, 19 Ves. 205; *Edenborough v. Canterbury*, 2 Russ. 94; *Brodie v. St. Paul*, 1 Ves. Jr. 326.

(*a*) In the absence of agreement, costs belong to the attorney of the successful party. *Arend v. Cottle*, 34 N. Y. S. 913; *People v. Buffalo*, 28 id. 158. If both parties prevail in part, costs should not be given to either. *West v. Utica*, 24 N. Y. S. 1075; *Barker v. Laney*, 40 id. 66. In matters of accounting, and in amicable suits, the costs are properly divided in equity, when there is no fault. *Rotch v. Livingston*,

slightly varied in some cases. Thus in England, if an executor sues upon a cause of action accruing during his testator's lifetime, he is not liable for costs if he fails; but if he is sued, and judgment is awarded against him, he must pay costs like any other defendant.<sup>1</sup> And this rule has been followed in some of the United States.<sup>2</sup> But even where a modified rule prevails, courts may impose costs for bringing any improper suits by executors or others suing in a fiduciary capacity.<sup>3</sup> If executors or trustees are compelled to pay costs, the amount paid may be allowed to them in their accounts, if the litigation was just and proper;<sup>4</sup> but if the liti-

<sup>1</sup> 2 Wms. Ex'rs, 1718, 1792.

<sup>2</sup> *Justices v. Haygood*, 20 Ga. 847; *Knox v. Bigelow*, 15 Wis. 415; *Jamison v. Lindsay*, 1 Bail. 79; *Buckels v. Carter*, 6 Rich. 106; *Wright v. Wright*, 2 McCord, Ch. 185; *Farrier v. Cairns*, 5 Ohio, 45; *Knowles v. Knowles*, 86 Ill. 1; *Harrison v. Warner*, 1 Blackf. 385; *Caperton v. Callson*, 1 J. J. Marsh. 396; *Hanson v. Jacks*, 22 Ala. 549; *Callender v. Keystone, M. Ins. Co.*, 23 Penn. St. 471; overruling *Ewing v. Furness*, 13 id. 532; *Shaw v. Conway*, 7 id. 136; *Muntorff v. Muntorff*, 2 Rawle, 180. In New York, trustees and executors must pay costs if they fail. *Finley v. Jones*, 6 Barb. 229; *Rose v. Rose*, 28 N. Y. 184; 2 R. S. 615, § 17. The law, as stated in *Ketchum v. Ketchum*, 4 Cow. 87, is changed. In Virginia, executors pay costs like other parties. 2 Lomax Ex'rs, 38.

<sup>3</sup> 2 Wms. Ex'rs, 1718, 1792; *Hanson v. Jacks*, 22 Ala. 549; *Alexander v. Alexander*, 5 Ala. 517; *Savage v. Dickson*, 16 Ala. 260; *Roosevelt v. Ellithorp*, 10 Paige, 415; *Waterman v. Cochran*, 2 Vt. 699.

<sup>4</sup> *Hardy v. Call*, 16 Mass. 530; *Williams v. Mattocks*, 3 Vt. 189; *Connally v. Pardon*, 1 Paige, 291; *Long v. Israel*, 9 Leigh, 596; *Garner v. Strode*, 5 Lit. 314; *Moses v. Murgatroyd*, 1 Johns. Ch. 473; *Dyer v. Potter*, 2 id. 152; *Roosevelt v. Ellithorp*, 10 Paige, 415; *Arnoux v. Steinbrenner*, 1 id. 82; *Delafield v. Caldew*, id. 139; *Collins v. Hoxie*, 9 id. 81; *Ex parte Croxton*, 5 De G. & Sm. 432; *Gage v. Rogers*, 1 Strobb. Eq. 370; *Capelhart v. Huey*, 1 Hill, Eq. 405; *Knox v. Pickett*, 4 Des. 92; *Mumper's App.*, 3 W. & S. 413; *Gouverneur v. Titus*, 1 Edw. Ch. 477; *Carow v. Mowatt*, 2 Edw. Ch. 57; *Day v. Day*, 2 Green, Ch. 549; *Morton v. Barrett*, 22 Maine, 257; *Miles v. Bacon*, 4 J. J. Marsh. 468; *Peyton v. McDowell*, 3 Dana, 314; *Hill v. Morgan*, 2 Moll. 460; *Lowrie's App.*, 1 Grant

91 Maine, 461; *Randolph v. Inman*, costs between parties, see *Tefft v. 172 Ill. 575*; *Waterman v. Alden*, Stearn, 74 F. R. 755; *Waller v. 144 Ill. 90*; *Stocker v. Hutter*, 134 Jones, 107 Ala. 331; *Cass v. Stearns*, Penn. St. 19; *Garvey v. Owens*, 12 66 N. H. 301; *Greenleaf v. Allen*, N. Y. S. 349. As to dividing 83 Maine, 333.

gation was improper and vexatious, courts may refuse to allow such charges.<sup>1</sup> It is the duty of an executor to present the will of his testator to the court of probate for allowance. If an issue of *devisavit vel non* is raised upon the will, it is the duty of the executor to take care that the issue is properly tried, and he will be allowed his costs out of the estate even though he may fail.<sup>2</sup> And so it is within the discretion of the court in some States to allow the opposite party costs out of the fund. Thus the executor must present the will for probate, and he should be allowed his reasonable costs for vindicating the action of the testator in making a will. So the heirs are not to be disinherited except upon clear proof of a will. If there is any doubt upon that question or issue, they are entitled to a fair trial; and the court may in its discretion allow them the costs of trial out of the estate. And costs as between solicitor and client may be allowed in such cases to both parties out of the fund;<sup>3</sup> but if there is any misconduct on the part of the executor, he may be compelled to pay costs; and so, if there is no reasonable ground to dispute the will, the heirs, as contestants, may be ordered to pay costs.<sup>4</sup> In all cases where trustees are compelled to pay costs in suits with strangers, the costs are taxed as between party and party, and not as between attorney and client.<sup>5</sup> If trustees are brought before the court as necessary

Cas. 373; Graver's App., 58 Penn. St. 189; Casey's Est., 47 id. 424; McElhenny's App., 46 id. 347.

<sup>1</sup> Armstrong's Est., 6 Watts, 236; Callighan v. Hall, 1 S. & R. 211; Getman v. Beardsley, 2 Johns. Ch. 274; Davis v. Davis, 2 Hill, Eq. 377.

<sup>2</sup> Drew v. Wakefield, 54 Maine, 291; Abbott v. Bradstreet, 3 Allen, 587; Perrine v. Applegate, 1 N. J. Eq. 531; Collins v. Townley, 21 id. 353.

<sup>3</sup> Ibid.

<sup>4</sup> Woodbury v. Obear, 7 Gray, 472; Nickerson v. Buck, 12 Cush. 343; Day v. Day, 2 Green, Ch. 549; Townshend v. Brooke, 9 Gill, 90; Scott's Est., 9 Watts & S. 98; Perrin v. Applegate, 1 McCarter, 531; Collins v. Townley, 21 N. J. Eq. 353. But a different rule prevails in some States. See Mumper's App., 3 W. & S. 443; Royer's App., 13 Penn. St. 569; Verner's Est., 6 Watts, 250.

<sup>5</sup> Mohun v. Mohun, 1 Swanst. 201; Saunders v. Saunders, 3 Jur. (N. S.) 727; McKern v. Handy, 4 Md. Ch. 234; Ralston v. Telfair, 2 Dev. & Bat. 414.

parties by strangers, they are entitled to their costs if they disclaim all interest, or yield;<sup>1</sup> but if they contest the suit they must upon failure pay costs like other parties.<sup>2</sup> Though if they make a claim, by way of submission to the court whether they have any, they may have their costs.<sup>3</sup>

§ 892. Courts of equity have a discretion in respect to the costs of proceedings before them. And this discretion cannot be reviewed.<sup>4</sup> No party is entitled to costs except by a special order.<sup>5</sup> A stranger may fail in a suit against a trustee, and yet the court may not order costs; and the fact that the defendant was a trustee will not control the discretion of the court.<sup>6</sup> So a party may have a decree in his favor, and yet be ordered to pay the costs.<sup>7</sup> In England, a mortgagee is entitled to his costs, whether the suit is to foreclose or redeem the mortgage. So, where trustees are necessary parties, as mortgagees, to such suits, whether they were original parties to the mortgage, or some interest has been subsequently assigned to them, they are entitled to their costs.<sup>8</sup> If a creditor files a bill against an executor for an account and payment of a debt, the executor will not be decreed to pay costs personally, if the assets are insufficient to pay both debts and costs,<sup>9</sup> unless he had misconducted himself and misapplied the assets.<sup>10</sup> He may even retain his own costs

<sup>1</sup> *Bartle v. Wilkin*, 8 Sim. 238; *Brown v. Lockhart*, 10 id. 416.

<sup>2</sup> *Rashley v. Masters*, 1 Ves. Jr. 201.

<sup>3</sup> *Ibid.*; *Wood v. Vanderburg*, 6 Paige, 278; *Morrell v. Dickey*, 1 Johns. Ch. 153.

<sup>4</sup> *Taylor v. Root*, 48 N. Y. 687.

<sup>5</sup> *Kreitz v. Frost*, 55 Barb. 474.

<sup>6</sup> *Brodie v. St. Paul*, 1 Ves. Jr. 326; *State v. Tolan*, 33 N. J. L. 195; *Kreitz v. Frost*, 55 Barb. 474.

<sup>7</sup> *Armstrong v. Zane*, 12 Ohio, 287; *Coleman v. Ross*, 46 Penn. St. 180; *Gray v. Dougherty*, 25 Cal. 266.

<sup>8</sup> *Brown v. Lockhart*, 10 Sim. 426; *Wetherill v. Collins*, 3 Madd. 255; *Bartle v. Wilkin*, 8 Sim. 238. But see *Horrocks v. Ledsam*, 2 Col. C. C. 208.

<sup>9</sup> *Twistleton v. Thelwell*, Hard. 165; *Uvedale v. Uvedale*, 3 Atk. 119; *Davy v. Seys*, Mose. 204; *Morony v. Vincent*, 2 Moll. 461.

<sup>10</sup> *Jefferies v. Harrison*, 1 Atk. 468; *Bennett v. Atkins*, 1 Y. & Col. 247; *Wilkins v. Hunt*, 2 Atk. 151.

out of the assets,<sup>1</sup> though formerly the practice was different.<sup>2</sup>

§ 893. It is difficult to state, as a general proposition, any rule as to costs in suits between *cestuis que trust* and trustees in relation to the trust fund. Courts of equity, having almost exclusive jurisdiction over such suits, have at the same time an unlimited discretion over the costs of them; and decrees as to the costs are made in a great variety of forms, to meet every degree of fidelity or neglect. The cases are ranged under four principal heads: (1) Where trustees are allowed their costs; (2) Where they are not allowed their costs; (3) Where costs are imposed upon them; and (4) Where they are allowed costs on one part of the case, and are refused their costs or are ordered to pay the costs, upon some other part of the case.

§ 894. The general rule is, that trustees shall have their costs either out of the trust fund, or from the *cestuis que trust* personally.<sup>3</sup> (a) If there is a fund within the control of the

<sup>1</sup> Bennett v. Going, 1 Moll. 529; Tipping v. Power, 1 Hare, 405; Ottley v. Gilby, 8 Beav. 603; Tanner v. Dancey, 9 Beav. 339.

<sup>2</sup> Humph v. Morse, 2 Atk. 408; Sandys v. Watson, id. 80; Adair v. Shaw, 1 Sch. & Lef. 280.

<sup>3</sup> Amand v. Bradbourne, 2 Ch. Cas. 138; Mohun v. Mohun, 1 Swanst. 201; Pride v. Fooks, 2 Beav. 437; Whitmarsh v. Robertson, 1 Y. & Col. Ch. 717; Hall v. Hallett, 1 Cox, 141; Att. Gen. v. London, 3 Bro. Ch.

(a) Am. Box M. Co. v. Crossman, 57 F. R. 1029; Barnard v. Adams, 58 id. 313; Cox v. Wills, 49 N. J. Eq. 573; Stratton v. Physio-Med. College, 149 Mass. 505; Evans' Estate, 155 Penn. St. 646. Costs caused by the court's error are to be charged against the trust estate. Weil v. Lehmayr, 74 Md. 81.

In an equity suit brought by one as representative of a class, his costs and necessary expenses are to be reimbursed from the trust property or

by proportional contribution from those accepting the benefit of his efforts. Hobbs v. McLean, 117 U. S. 567, 582; Seibert v. Minneapolis, &c. Ry. Co., 58 Minn. 58. In Massachusetts, this rule applies not only to express trusts, but also to proceedings for the common benefit of many interested in the preservation of property. Davis v. Bay State League, 158 Mass. 434; Clark v. Sawyer, 151 Mass. 64.

court, they may have their costs as between solicitor and client.<sup>1</sup> Where there is no fund within control of the court, if the *cestuis que trust* bring the trustees before it to obtain a direction as to the rights of the parties, or the mode of administration, and the trustees are free from all blame or fault, they are entitled to costs against the *cestuis que trust* personally, to be taxed as between solicitor and client.<sup>2</sup> (a) The reason involved in the rule is this: trustees have no beneficial interest in the trust property. They hold it for the accommodation and benefit of others. If they perform their duties faithfully, and are guilty of no unjust, improper, or oppressive conduct, they ought not in justice and good conscience to be put to any expense out of their own moneys. If, therefore, they are brought before the court without blame on their part, they should be reimbursed all the expenses that they incur, and allowed their costs as between solicitor and client for this purpose. So, if it appears to the court by the pleadings or otherwise that they have sustained charges

171; *Coventry v. Coventry*, 1 Keen, 758; *Curteis v. Candler*, 6 Madd. 123; *Taylor v. Glanville*, 3 id. 176; *Rashley v. Masters*, 1 Ves. Jr. 201; *Sammes v. Rickman*, 2 Ves. Jr. 38; *Masset v. Pocock*, t. Finch, 136; *Rocke v. Hart*, 11 Ves. 58; *Landen v. Green*, Barn. 389; *Norris v. Norris*, 1 Cox, 183; 1 Eq. Cas. Ab. 125; *Hosack v. Rogers*, 9 Paige, 463; *Irving v. De Kay*, id. 533; *Minuse v. Cox*, 5 Johns. Ch. 451; *Graver's App.*, 50 Penn. St. 189; 2 Dan. Ch. Prac. 1411 (4th Am. ed.). And the same general rules apply to executors or administrators brought into court. *Jewett v. Woodward*, 1 Edw. 200; *Day v. Day*, 2 Green, Ch. 549; *Morton v. Barrett*, 22 Maine, 257; *McKim v. Handy*, 4 Md. Ch. 234; *Townshend v. Brooke*, 9 Gill, 90; *Glass v. Ramsey*, id. 459; *Capehart v. Huey*, 1 Hill, Eq. 405; *Hester v. Hester*, 3 Ired. Eq. 9; *Scott's Est.*, 9 W. & S. 98; *Burr v. McEwen*, 1 Baldw. C. C. 154; *Bendall v. Bendall*, 24 Ala. 295; *Atcheson v. Robertson*, 4 Rich. Eq. 39; *Keeler v. Keeler*, 3 Green (N. J.), 267. Reasonable costs of parties properly before the court to litigate a question as to the parties entitled to receive a legacy for charitable purposes, when the right was doubtful, will be allowed out of the fund. *Bliss v. Am. Bible Soc.*, 3 Allen, 334.

<sup>1</sup> *Mohun v. Mohun*, 1 Swanst. 201; *Moore v. Frowd*, 3 M. & C. 49.

<sup>2</sup> *Att. Gen. v. Cuming*, 2 Y. & Col. Ch. 155; *Edenborough v. Canterbury*, 2 Russ. 112; *Downing v. Marshall*, 37 N. Y. 380.

(a) *Andrews v. Barnes*, 39 Ch. D. 133.



and expenses beyond the costs of the suit, as between solicitor and client, the court will order such further expenses properly incurred to be paid to them; but such order will not embrace the costs and expenses of other suits, unless specially mentioned.<sup>1</sup>

§ 895. If the trustee, or one of the trustees, is a solicitor, he can make no professional charge against the trust fund although he may have conducted the defence;<sup>2</sup> but the court will nevertheless order costs as between solicitor and client, and leave them to be taxed by the proper officer, according to the rules of law, upon the proper vouchers presented to him.<sup>3</sup>

§ 896. But where plaintiffs bring a bill against defendants for the purpose of *creating a trust fund*, — as if they bring a bill to convert defendants into trustees under a constructive trust, or to compel the defendants to hold certain property in their hands in trust for the plaintiffs,<sup>4</sup> — the defendants can have costs only as between party and party, if the plaintiffs fail; for the suit in such case turns out to be between strangers.<sup>5</sup>

§ 897. Where a trustee neglected to appear at the hearing, and a decree *nisi* was made against him, but a rehearing was obtained upon paying the costs of the day, the court ordered costs for the trustee, saying that the payment of the

<sup>1</sup> *Payne v. Little*, 27 Beav. 83; *Hall v. Laver*, 1 Hare, 577; *Amand v. Bradbourne*, 2 Ch. Cas. 138; *Worrall v. Harford*, 8 Ves. 8; 2 Dan. Ch. Prac. 1411 (4th Am. ed.); *Downing v. Marshall*, 37 N. Y. 380.

<sup>2</sup> *Ante*, § 432, and cases cited; *Meyer v. Galluchat*, 6 Rich. 1; *Moore v. Frowd*, 3 M. & Cr. 45; *Lincoln v. Winsor*, 9 Hare, 158; *Broughton v. Broughton*, 5 De G., M. & G. 160.

<sup>3</sup> *York v. Brown*, 1 Col. C. C. 260. And see *Re Taylor*, 23 L. J. Ch. 857; *Bainbrigge v. Blair*, 8 Beav. 588; *Cradock v. Piper*, 1 Mac. & G. 688.

<sup>4</sup> See *ante*, Chap. VI.

<sup>5</sup> *Mohun v. Mohun*, 1 Swanst. 201; *Saunders v. Saunders*, 3 Jur. (n. s.) 728; *Gaylords v. Kelshaw*, 1 Wall. 81.

costs of the day makes the trustee *rectum in curia*, and as he would have been entitled to his costs on the first hearing, he now stands in the same situation.<sup>1</sup> But if a trustee neglects to ask for his costs, and a final decree is passed, he cannot have a rehearing upon the question of costs alone, nor can he obtain an order for costs upon a simple petition in the case.<sup>2</sup>

§ 898. Courts always scrutinize transactions between parent and children, and where a trustee refused to convey to a child or parent until the transaction could be examined, he was allowed his costs,<sup>3</sup> and so if the breach of trust is very trivial, he may be allowed his costs.<sup>4</sup> (a) If a person named as trustee is made defendant in a suit, and by his answer disclaims, he will be allowed his costs as a party, but not as between solicitor and client; for, not being a trustee, he must be an ordinary party;<sup>5</sup> but if his answer is unreasonably long, he will have only the costs of a disclaimer.<sup>6</sup> But the plaintiff may limit the extent of an answer required from a defendant; and if he does not limit it, but requires an answer to the whole bill, costs of the whole answer will be allowed.<sup>7</sup>

§ 899. The general rule, that trustees are to have their costs, applies whether they are plaintiffs or defendants;<sup>8</sup> and so all persons whom it is necessary for the trustees to

<sup>1</sup> *Norris v. Norris*, 1 Cox, 183.

<sup>2</sup> *Colman v. Lord*, 2 Cox, 206.

<sup>3</sup> *King v. King*, 1 De G. & J. 663, 671.

<sup>4</sup> *Fitzgerald v. Pringle*, 2 Moll. 534; *Bailey v. Gould*, 4 Y. & Col. 221; *Knott v. Cottee*, 16 Beav. 77; *Cotton v. Clark*, id. 134.

<sup>5</sup> *Hickson v. Fitzgerald*, 1 Moll. 14; *Norway v. Norway*, 2 M. & K. 278, overruling *Sherratt v. Bentley*, 1 R. & M. 655.

<sup>6</sup> *Martin v. Persse*, 1 Moll. 146.

<sup>7</sup> *Aldridge v. Westbrooke*, 4 Beav. 213.

<sup>8</sup> *Curteis v. Candler*, 6 Madd. 123; *Coventry v. Coventry*, 1 Keen, 758; *Bowditch v. Soltyk*, 99 Mass. 136; *Towle v. Swazey*, 106 Mass. 108; *Sargent v. Sargent*, 103 Mass. 297; *Hepburn's App.*, 65 Penn. St. 472; *Price's App.*, 54 id. 492.

(a) See *In re Beddoe*, [1893] 1 Ch. 547.

bring before the court as parties, in order to obtain a valid decree to protect them in the discharge of their duties in disposing of the trust fund, will be entitled to their costs.<sup>1</sup> But this rule is under the control of the court, and the conduct of the parties will be carefully scrutinized; and if trustees appear in a suit when it is unnecessary, they will not be allowed their costs.<sup>2</sup> So if they institute a suit when one is already pending in which all their rights can be determined, they will not have costs.<sup>3</sup>

§ 900. If the misconduct or failure of the trustee to perform his duty,<sup>4</sup> or his mere caprice or obstinacy<sup>5</sup> (a) renders

<sup>1</sup> *Hicks v. Wrench*, 6 Madd. 93; *Drew v. Wakefield*, 54 Maine, 291; *Abbott v. Bradstreet*, 3 Allen, 587; 2 Dan. Chan. Prac. 1412 (4th Am. ed.).

<sup>2</sup> *Bennett v. Biddles*, 10 Jur. 534; *Beer v. Tapp*, 31 L. J. Ch. 513.

<sup>3</sup> *Packwood v. Maddison*, 2 S. & S. 232; 2 Dan. Chan. Prac. 1412, 1413 (4th Am. ed.).

<sup>4</sup> *Springett v. Dashwood*, 2 Gif. 521; *Caffrey v. Darby*, 6 Ves. 488; *Hide v. Haywood*, 2 Atk. 126; *Sheppard v. Smith*, 2 Bro. P. C. 372; *Stackpoole v. Stackpoole*, 1 Dow. 209; *Lyse v. Kingdom*, 1 Col. C. C. 184; *Powlett v. Herbert*, 1 Ves. Jr. 297; *Byrne v. Norcott*, 13 Beav. 346; *Fell v. Lutwidge*, Barn. 319; *Brown v. How*, id. 354; *Littleholes v. Gascoyne*, 3 Bro. Ch. 373; *Att. Gen. v. Hobart*, Ca. t. Finch, 259; *Ashburnham v. Thompson*, 13 Ves. 402; *Mosley v. Ward*, 11 Ves. 581; *Haberdashers' Company v. Att. Gen.*, 2 Bro. P. C. 370; *Crackett v. Bethune*, 1 J. & W. 586; *Att. Gen. v. Wilson*, 1 Cr. & Phil. 1; *Baker v. Carter*, 1 Y. & Col. 252; *Wilson v. Wilson*, 2 Keen, 249; *Franklin v. Frith*, 3 Bro. Ch. 433; *Pietz v. Stace*, 4 Ves. 620; *Whistler v. Newman*, id. 129; *Seers v. Hind*, 1 Ves. Jr. 294; *Adams v. Clifton*, 1 Russ. 297; *Egerton v. Egerton*, 2 Green (N. J.), 419; *Att. Gen. v. Drapers' Co.*, 4 Beav. 67; *Att. Gen. v. Caius Coll.*, 2 Keen, 169; *Att. Gen. v. East Retford*, 2 M. & K. 35; *Kent v. Hutchins*, 50 N. H. 92; *Jefferys v. Marshall*, 19 W. R. 94; *Ellis v. Barker*, L. R. 7 Ch. 104; *Lathrop v. Smalley*, 23 N. J. Eq. 192.

<sup>5</sup> *Smith v. Bolden*, 33 Beav. 266; *Scarborough v. Parker*, 1 Ves. Jr. 267; *Burrows v. Greenwood*, 4 Y. & Col. 251; *Kirby v. Mash*, 3 id. 295; *Penfold v. Bouch*, 4 Hare, 271; *Jones v. Lewis*, 1 Cox, 199; *Taylor v. Glanville*, 3 Madd. 178; *Thorby v. Yeates*, 1 Y. & Col. Ch. 438; *May v.*

(a) *In re Knox's Trusts*, [1895] 1 Ch. 538; *cago, &c. R. Co.*, 129 Mass. 46; 2 id. 483; *Iasigi v. Chi-Powell v. Powell*, 114 Ill. 329.

a suit necessary, he must pay the costs. So if he refuses to account,<sup>1</sup> or wilfully misstates the accounts,<sup>2</sup> or by any chicanery in his answer keeps the *cestui que trust* from a correct knowledge of the accounts,<sup>3</sup> or if he has kept the accounts in a careless and confused manner,<sup>4</sup> or has mingled the trust fund with his own money and not accounted,<sup>5</sup> the court will charge him with the costs. If an executor denies that there are assets, contrary to the fact, he will be charged with the costs.<sup>6</sup> So if a trustee alleges in his answer that the *cestui que trust* is largely indebted to him, and after a long investigation it turns out that the trustee is greatly in arrears, he will be decreed to pay costs.<sup>7</sup> Or even if the amount due the trustee is much less than he claimed, he will be ordered to pay the costs.<sup>8</sup> So if a trustee sets up a claim of his own to the trust property, and fails in his claim, he must pay all the costs.<sup>9</sup> So if a trustee refuses the use of his name in the prosecution of a suit for the interests of the trust estate and

Armstrong, 1 W. N. 233; Hampshire v. Bradley, 2 Col. 34; Jones v. Lewis, 1 Cox, 199; Moore v. Prance, 9 Hare, 299; Firmin v. Pulham, 2 De G. & Sm. 99; Brinton's Est., 10 Penn. St. 408; Goodson v. Ellisson, 3 Russ. 583; Lyse v. Kingdom, 1 Col. C. C. 184; Lathrop v. Smalley, 23 N. J. Eq. 192.

<sup>1</sup> Boynton v. Richardson, 31 Beav. 340; Wroe v. Seed, 4 Gif. 425; Kemp v. Burn, id. 348; Burnham v. Dalling, 7 Green (N. J.), 310; Sheppard v. Smith, 2 Bro. P. C. 372; Avery v. Osborne, Barn. 349.

<sup>2</sup> Flannagan v. Nolan, 1 Moll. 86; Sheppard v. Smith, 2 Bro. P. C. 372.

<sup>3</sup> Reech v. Kennegal, 1 Ves. 123; Avery v. Osborne, Barn. 349.

<sup>4</sup> Norbury v. Calbeck, 2 Moll. 461.

<sup>5</sup> Bogle v. Bogle, 3 Allen, 158.

<sup>6</sup> Sandys v. Watson, 2 Atk. 80; Vaughan v. Thurston, Colles, P. C. 175; Mallabar v. Mallabar, t. Talb. 71; Sheppard v. Smith, 2 Bro. & C. 372.

<sup>7</sup> Parrott v. Treby, Pr. Ch. 254; Eglin v. Sanderson, 3 Gif. 434.

<sup>8</sup> Fozier v. Andrews, 2 Jo. & La. 199; Att. Gen. v. Brewers' Co., 1 P. Wms. 376.

<sup>9</sup> Lloyd v. Spillett, 3 P. Wms. 344; Bayly v. Powell, Pr. Ch. 92; Wilis v. Hiscox, 4 M. & C. 179; Att. Gen. v. Drapers' Co., 4 Beav. 67; Att. Gen. v. Christ's Hospital, id. 73; Irwin v. Rogers, 12 Ir. Eq. 159; Lawson v. Copeland, 2 Bro. Ch. 156; Baggot v. Baggot, 10 L. J. Ch. (N. S.) 116; Lemmond v. Peoples, 6 Ir. Eq. 137; Waterman v. Cochran, 2 Vt. 699.

the *cestui que trust*, whereby the *cestui que trust* is obliged to institute the suit in his own name, and join the trustee as a defendant, the court will order the trustee to pay the costs.<sup>1</sup> So if a trustee has some private interest of his own, separate from and independent of the trust, and he compels the *cestui que trust* to come into a court of equity, merely for the purpose of procuring a decision, at the expense of the estate, upon some point relating to his own private interest, the court will decree him to pay the whole costs.<sup>2</sup> The trust estate is not chargeable with the costs of defending one of the trustees upon inquisition of lunacy.<sup>3</sup> So where trustees in their answer pleaded ignorance of the trust, but the court inferred, from the papers annexed to the answer, an intention to defeat the ends of justice, costs were imposed upon the trustees;<sup>4</sup> and where the court ordered the production of papers, and very material ones were suppressed, costs were imposed upon the trustees;<sup>5</sup> and where an executor puts the plaintiffs unnecessarily to proof of their relationship, costs are imposed.<sup>6</sup> So if the trustees set up any unfounded or inequitable defence.<sup>7</sup> It was said by Lord Thurlow, that, where the court is obliged to give interest as a remedy for a breach of trust, costs will follow of course;<sup>8</sup> that is to say,

<sup>1</sup> Guyton v. Shane, 7 Dana, 498 ; Reade v. Sparkes, 1 Moll. 8 ; Blount v. Burrow, 2 Bro. Ch. 90. But see Brown v. Lockhart, 10 Sim. 426.

<sup>2</sup> Henley v. Phillips, 2 Atk. 48 ; Manning v. Manning, 1 Johns. Ch. 535 ; Ralston v. Telfair, 2 Dev. & Bat. 414 ; Ingram v. Kirkpatrick, 8 Ired. Eq. 62. But trustees have a right to the aid of a court in accounting, and to their costs ; therefore trustees may have their costs for accounts, although they claim an interest in the trust fund or its proceeds as one of the *cestuis que trust*. Atcheson v. Robertson, 4 Rich. Eq. 44 ; Pell v. Ball, Speers, Eq. 48 ; Hartzell v. Brown, 5 Binn. 138 ; Royer's App., 13 Penn. St. 569 ; Raybold v. Raybold, 20 id. 308 ; Worrell's App., 23 id. 44 ; Halmon's App., 24 id. 172 ; Carpenter's App., 3 Grant's Cas. 381 ; Wham v. Love, Rice, Eq. 51.

<sup>3</sup> Bickham v. Smith, 55 Penn. St. 335.

<sup>4</sup> Att. Gen. v. East Retford, 2 M. & K. 35.

<sup>5</sup> Borough of Hertford v. Poor of Hertford, 2 Bro. P. C. 377.

<sup>6</sup> Lawson v. Copeland, 2 Bro. Ch. 156.

<sup>7</sup> Burnham v. Dalling, 1 Green, Ch. 310.

<sup>8</sup> Seers v. Hind, 1 Ves. Jr. 294. And see Franklin v. Frith, 3 Bro. Ch. 433 ; Mosley v. Ward, 11 Ves. 581 ; Piety v. Stace, 4 Ves. 620.

that, where a suit is occasioned by the misconduct of trustees, the charging them with interest is such an indication of misconduct that costs follow: and the same principle was acted upon in *Frey v. Frey*;<sup>1</sup> but Sir William Grant denied that there was any such rule, and said that there might be cases when a trustee could be charged with interest, but not with costs.<sup>2</sup>

§ 901. Where a trustee is guilty of some misconduct which does not amount to a wilful breach of the trust, or of some omission of duty which is of some inconvenience to the trust, he will not be allowed his costs.<sup>3</sup> Thus, if he files an improper answer, he will not be allowed the costs of the answer.<sup>4</sup> So an innocent *mistake* by the trustee may deprive him of his costs,<sup>5</sup> or the court may decree him to pay part of the costs,<sup>6</sup> or even give him his whole costs.<sup>7</sup> So, where an executor was entitled to have his accounts taken under the direction of the court, he was not allowed his costs, because of his conduct in obstructing the settlement of the accounts;<sup>8</sup>

<sup>1</sup> *Frey v. Frey*, 17 N. J. Eq. 71; *Warbass v. Armstrong*, 2 Stockt. 266; *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508.

<sup>2</sup> *Ashburnham v. Thompson*, 13 Ves. 404; *Tebbs v. Carpenter*, 1 Madd. 308; *Woodhead v. Marriott*, C. P. Cooper, 62, 1837, 1838; *Holgate v. Hayworth*, 17 Beav. 259; *Fletcher v. Walker*, 3 Madd. 73; *Mousley v. Carr*, 4 Beav. 49; *MacKenzie v. Taylor*, 7 Beav. 467; *Fozier v. Andrews*, 2 J. & Lat. 199; *Cotton v. Clark*, 16 Jur. 879.

<sup>3</sup> *O'Callagan v. Cooper*, 5 Ves. 129; *Massey v. Banner*, 4 Madd. 113; *Newton v. Bennett*, 1 Bro. Ch. 362; *Mousley v. Carr*, 4 Beav. 49; *England v. Downs*, 6 Beav. 279; *Dawson v. Parrot*, 3 Bro. Ch. 236; *Spencer v. Spencer*, 11 Paige, 159.

<sup>4</sup> *Eddowes v. Eddowes*, 30 Beav. 603.

<sup>5</sup> *Fitzgerald v. Fitzgerald*, 6 Ir. Eq. 145; *O'Callagan v. Cooper*, 5 Ves. 117; *Mousley v. Carr*, 4 Beav. 49; *Att. Gen. v. Drapers' Co.*, id. 71; *Devey v. Thornton*, 9 Hare, 222; *Bennett v. Going*, 1 Moll. 529; *Robertson v. Wendell*, 6 Paige, 322.

<sup>6</sup> *East v. Ryall*, 2 P. Wms. 284.

<sup>7</sup> *Taylor v. Tabrum*, 6 Sim. 281; *Flanagan v. Nolan*, 1 Moll. 84; *Travers v. Townsend*, id. 496; *Att. Gen. v. Caius College*, 2 Keen, 150, 170; *Bennett v. Atkins*, 1 Y. & Col. 247, 249; *Fitzgerald v. O'Flaherty*, 1 Moll. 347; *Att. Gen. v. Drummond*, 2 Conn. & Laws. 98; *Royds v. Royds*, 14 Beav. 54; *Fitzgerald v. Pringle*, 2 Moll. 534.

<sup>8</sup> *Re King*, 11 Jur. (N. S.) 899; *Raphael v. Boehm*, 13 Ves. 592. All

but costs were not imposed upon him. So, if a trustee makes a claim in his account which is very much reduced by the court, costs will not be allowed him.<sup>1</sup> The court will give no costs to a defaulting trustee; as, if a balance is found due from a trustee, he can have no costs until he pays it.<sup>2</sup> So if a trustee renders it necessary to institute a suit for the appointment of a new trustee, where it might have been done by agreement of the parties, he will not be allowed his costs.<sup>3</sup> But if the trustee has a good reason for his discharge, as the misconduct of the *cestui que trust*, or his own age and infirmities, he may have the costs of a proceeding in equity for his discharge.<sup>4</sup> (a) Where a trustee refuses to convey, or insists upon making an improper conveyance, and to improper persons, he may be refused his costs;<sup>5</sup> or he may even be made to pay costs,<sup>6</sup> although he acts under the advice of counsel.<sup>7</sup>

such matters are very much within the discretion of the court, and costs of the audit of the accounts may be allowed, although there has been a breach of the trust. *Norris's App.*, 71 Penn. St. 115, 126.

<sup>1</sup> *Att. Gen. v. Brewers' Co.*, 1 P. Wms. 376; *Fozier v. Andrews*, 2 Jo. & Lat. 199; *Dawson v. Parrot*, 3 Bro. Ch. 236; *Ball v. Montgomery*, 2 Ves. Jr. 191.

<sup>2</sup> *Birks v. Micklethwait*, 33 Beav. 409.

<sup>3</sup> *Howard v. Rhodes*, 1 Keen, 581; *Greenwood v. Wakeford*, 1 Beav. 580; *Denbow v. Davies*, 11 Beav. 369; *Re Tryon*, 7 Beav. 496; *Gabril v. Sturgis*, 5 Hare, 97; *Jones v. Stockett*, 2 Bland, 409; *Re Molony*, 2 J. & Lat. 391; *Porter v. Watts*, 21 L. J. Ch. 211; *Cruger v. Halliday*, 11 Paige, 314.

<sup>4</sup> *Coventry v. Coventry*, 1 Keen, 758; *Greenwood v. Wakeford*, 1 Beav. 576.

<sup>5</sup> *Ellis v. Ellis*, 1 Russ. 368; *Knight v. Martin*, 1 R. & M. 70; *Campbell v. Horne*, 1 N. C. C. 664; *Angier v. Stannard*, 3 M. & K. 566; *Poole v. Pass*, 1 Beav. 600.

<sup>6</sup> *Jones v. Lewis*, 1 Cox, 199; *Willis v. Hiscox*, 4 M. & Cr. 197; *Thorby v. Yeates*, 1 Y. & C. Ch. 438.

<sup>7</sup> *Angier v. Stannard*, 3 M. & K. 566; *Devey v. Thornton*, 9 Hare, 233. But *Poole v. Pass*, 1 Beav. 600, is contrary, and the better opinion is that

(a) A reasonable attorney's fee may be allowed from the estate when an application for a trustee's removal is unsuccessful. *Re Cadwell's Bank*, 89 Iowa, 533; *supra*, § 280; *Lycan v. Miller*, 56 Mo. App. 79. If such an application succeeds, the trustee is liable for the costs. *Ibid.*; *Lape v. Taylor* (Ky.), 23 S. W. 960. See *Royal v. Royal*, 30 Oregon, 448.

But a trustee may properly refuse to convey, where there is any doubt as to the person to whom the conveyance should be made, or as to the property to be conveyed, or as to the form of the conveyance, and he may take the advice of the court and have the costs of the suit.<sup>1</sup>

§ 902. Where a trustee commits a breach of trust the general rule is, that he must pay the costs of the suit to rectify the wrong; but if there are other matters involved in the suit, in which the trustee is found to be without fault, he may have his costs in such other matters.<sup>2</sup> (a) Thus where a bill charged a trustee with breach of trust in respect to both the real and personal property, and he was found to be wrongfully charged in relation to the real estate, he was ordered to pay costs for only one part of the bill.<sup>3</sup> So where there was a bill to set aside a purchase by the trustees of part of the trust property, and also for an account, the trustees were allowed the costs of the account, and ordered to

*Angier v. Stannard* is not good law. *Vez v. Emery*, 5 Ves. 144; *Hampson v. Bramwood*, 1 Madd. 392; *Bush's App.*, 33 Penn. St. 85; *Harper v. Munday*, 7 De G., M. & G. 369. But see *Boulton v. Beard*, 27 Eng. L. & Eq. 421.

<sup>1</sup> *Goodson v. Ellison*, 3 Russ. 593; *Poole v. Pass*, 1 Beav. 600; *Whitmarsh v. Robinson*, 1 Y. & C. Ch. 715; *Thorby v. Yeates*, id. 438; *Holford v. Phipps*, 3 Beav. 434; 4 Beav. 475; *Taylor v. Glanville*, 1 Madd. 176; *Dustan v. Dustan*, 1 Paige, 509; *Armstrong v. Zane*, 12 Ohio, 287.

<sup>2</sup> *Pocock v. Reddington*, 5 Ves. 800; *Hewett v. Foster*, 7 Beav. 348; *Bate v. Hooper*, 5 De G., M. & G. 345; *Re King*, 11 Jur. (N. S.) 899.

<sup>3</sup> *Ibid.*

(a) *Bell v. Turner*, 47 L. J. Ch. 75; *Easton v. Landor*, 67 L. T. 833. A solicitor is entitled to costs from the trust estate when he is not clearly notified of a breach of trust on the part of the trustee. *In re Blundell*, 40 Ch. D. 370; *Cochran v. Richmond & A. R. Co.*, 91 Va. 339. See *Budgett v. Budgett*, [1895] 1 Ch. 202. In general, a solicitor employed upon trust business acts for the trustee personally, and has no claim for costs against the trust estate, except so far as a distinct benefit can be shown to its administration. *Stanier v. Evans*, 34 Ch. D. 470; *In re Thompson*, 101 Cal. 349; *Weed's Estate*, 163 Penn. St. 595; *Bohrer v. Otterback*, 2 App. D. C. 78.



pay the costs of the other part of the bill.<sup>1</sup> So where the suit did not originate in the misconduct of the trustee, but in the course of its progress a breach of trust appeared, the court ordered the trustee to pay so much of the costs as were caused by the breach of the trust, and allowed him the costs of the other part of the suit.<sup>2</sup> (a) So where a trustee ought to have had his costs on one part of a suit, and to have paid costs on another, the court allowed no costs on either side.<sup>3</sup> If the breach of trust is very trifling, the court may overlook it, and give the trustee his whole costs.<sup>4</sup> So where grave charges of fraud were made against trustees, which failed, but they were removed on another ground, they were allowed their costs.<sup>5</sup>

§ 903. Where trustees are decreed to pay the costs of a suit occasioned by their misconduct, or where they are refused their costs for the same reason, they cannot charge the expenses of the suit to the trust fund in their hands; as their misconduct and breach of duty were personal, so the costs are personal, and must be borne by them personally.<sup>6</sup> (b)

<sup>1</sup> Sanderson v. Walker, 13 Ves. 601.

<sup>2</sup> Tebbs v. Carpenter, 1 Madd. 290; Heighton v. Grant, 1 Phil. 600; Pride v. Fooks, 2 Beav. 430.

<sup>3</sup> Newton v. Bennett, 1 Bro. Ch. 362.

<sup>4</sup> Fitzgerald v. Pringle, 2 Moll. 534; Bailey v. Gould, 4 Y. & Col. 221; Knott v. Cottee, 16 Beav. 77; Cotton v. Clark, id. 134.

<sup>5</sup> Stanes v. Parker, 9 Beav. 385.

<sup>6</sup> Att. Gen. v. Dangers, 33 Beav. 621; Lathrop v. Smalley, 23 N. J. Eq. 192. Where there has been a breach of trust, the *cestui que trust* is entitled to the double security which a decree for costs against all the trustees will give him, and no inquiry will be made as to whether one of the trustees has been more culpable than the other. Lawrence v. Bowle, 2 Ph. 140; Littlehales v. Gascoyne, 3 Bro. C. C. 73.

(a) See *In re Weall*, 42 Ch. D. 674; *In re Winslow*, 45 id. 249; *In re Hodgkinson*, (1895) 2 Ch. 190. Or by one trustee when he is a sole party to the suit. *Gomez v. Gomez*, 54 N. Y. S. 237.

(b) *Prima facie* costs given against parties who are trustees are against them as trustees and not as individuals. *Brigel v. Tug River Co.*, 73 F. R. 13; 70 id. 647.

§ 903 a. It is sometimes important to determine out of what fund in the hands of executors or trustees the costs of a suit are to be paid. The general rule is, that when a testator or settlor has expressed himself so ambiguously in relation to the disposition of his estate, or of any part of it, that it is necessary for the executors or trustees to apply to a court of equity for the construction of the instrument of trust, and for instructions and directions, the costs of all necessary parties shall be paid out of the general assets; and these are generally the residuary assets; for the costs of executing the will and of administering the trust are among the general expenses of settling an estate, and must be paid before anything can be distributed to residuary legatees. One reason of the rule is, that in the case of specific legacies, the legatee is entitled to the amount given if the estate is sufficient for the purpose; and to charge any cost upon the portion of any one legatee, or of any class of legatees, would be to change the proportion fixed by the testator. And further, if the testator or settlor has himself created the difficulty by the form of his expressions, it is equitable that his general estate should pay for clearing up the doubts raised by his own language.<sup>1</sup> But where a legacy has been

<sup>1</sup> Studholme v. Hodgson, 3 P. Wms. 300; Joliffe v. East, 3 Bro. Ch. 25, 27; Baugh v. Reed, id. 193; 1 Ves. Jr. 257; Att. Gen. v. Hurst, 2 Cox, 364; 3 Bro. Ch. 375, 381; Bagshaw v. Newton, 9 Mod. 283; Handley v. Davies, 5 Jur. 190; Barrington v. Tristram, 6 Ves. 345, 349; Howse v. Chapman, 4 Ves. 542; Anon., Mos. 5; Nisbett v. Murray, 5 Ves. 149, 158; Pearson v. Pearson, 1 Sch. & L. 12; Wilson v. Brownsmith, 9 Ves. 180, 182; Wilson v. Squire, 13 Sim. 212; Smith v. Smith, 4 Paige, 271; Bowditch v. Soltyk, 99 Mass. 136, 141; Sawyer v. Baldwin, 20 Pick. 378, 388; King v. Strong, 9 Paige, 94; Irving v. De Kay, id. 521; Moggridge v. Thackwell, 7 Ves. 87; Wilkinson v. Lindgren, L. R. 5 Ch. 570; Tann v. Tann, L. R. 7 Eq. 436; Monks v. Monks, 7 Allen, 401, 406; Abbott v. Bradstreet, 3 Allen, 587; Bigelow v. Morang, 103 Mass. 287; Bliss v. Amer. Tract Soc., 2 Allen, 334; Dean v. Home for Aged Women, Mass. Sup. Jud. Court, April, 1872. But it is said that this rule applies only to cases arising out of wills, and not to questions that arise upon deeds of trust, though it is hard to point out a distinction in cases where a trustee brings a bill for instructions in the nature of a bill of interpleader; and it would seem that the general rule, that where a trustee finds it neces-

severed from the general estate, and after it is so severed it becomes the subject of a suit, by the result of which the general estate will not be at all affected, the costs of the suit must be borne by the particular fund concerning which the suit arose.<sup>1</sup> If a party entitled to a legacy or a share of an estate incumbers it, and renders a suit necessary for the proper administration of that share, such particular fund must bear the expense of the suit.<sup>2</sup> (a) If the suit concerns several separate funds, but has no relation to the general estate, the several funds must bear the costs *pro rata*.<sup>3</sup> Sometimes the costs are paid not out of the fund in controversy, but out of the testators' residuary estate.<sup>4</sup> (b)

sary to seek for the direction of a court of equity, all parties whom it is necessary to bring before the court for his protection are entitled to their costs out of the fund, should prevail. See *ante*, § 899. See also *Hampson v. Broadwood*, 1 Madd. 381, 396; *Orford v. Churchill*, 3 Ves. & B. 59, 71; *Collett v. Collett*, 14 W. R. 446. In suits to rectify settlements under a deed where no blame was imputable to any of the parties, costs were allowed out of the fund. *Stock v. Vining*, 25 Beav. 235; 2 Dan. Ch. Pr. 1427.

<sup>1</sup> *Jenour v. Jenour*, 10 Ves. 562, 573; *Shaw v. Pickthall*, Dan. 92; *Manchester v. Bonham*, 3 Ves. 61, 64; *King v. Taylor*, 5 Ves. 806, 810; *Wilson v. Squire*, 13 Sim. 212; *Dugdale v. Dugdale*, 12 Beav. 247, 251; *Governesses' Institution v. Rusbridger*, 18 Beav. 467; *Richardson v. Rusbridger*, 20 Beav. 136; *Att. Gen. v. Lawes*, 8 Hare, 32, 43; *Pennington v. Buckley*, 6 Hare, 451, 455; *Cotton v. Penrose*, 13 Jur. 761; *Birdsall v. Hewlett*, 1 Paige, 32.

<sup>2</sup> *Greedy v. Lavender*, 11 Beav. 417; *Remnant v. Hood*, 27 Beav. 613; *Ward v. Yates*, 1 Dr. & Sm. 80; *Brace v. Ormond*, 2 J. & W. 435; *Garey v. Whittingham*, 5 Beav. 268, 270; *Farr v. Sheriffe*, 4 Hare, 528; 2 Dan. Ch. Pr. 1451.

<sup>3</sup> *Heighington v. Grant*, 1 Beav. 228; *Johnston v. Todd*, 8 Beav. 489, 492; *Hopkinson v. Ellis*, 10 Beav. 169, 176; *Sanders v. Miller*, 25 Beav. 154; *Elthorne v. Goode*, 14 Sim. 165, 179; *Christian v. Foster*, 2 Phil. 161, 166; *Att. Gen. v. Lawes*, 8 Hare, 32; 2 Dan. Ch. Pr. 1432 (4th Am. ed.).

<sup>4</sup> *Fidelity Ins. Co.'s App.*, 99 Penn. St. 443.

(a) As to set-off of costs, see *In re Harrauld*, 53 L. J. Ch. 505; *Tug River Co. v. Brigle*, 70 F. R. 647; 73 id. 13; *Fromme v. Gray*, 39 N. Y. S. 856. costs properly incurred by the tenant for life for the protection of the estate, either as plaintiff or defendant, or in particular proceedings. *In re Ormrod's Settled Estate*, [1892] 2

(b) In England, the court may now authorize trustees to pay the Ch. 318; *Hamilton v. Tighe*, [1898] 1 I. R. 123.

## CHAPTER XXXI.

## ALLOWANCES AND COMPENSATION TO TRUSTEES.

## In England, compensation.

- § 904. Trustees can have no compensation for time, trouble, and services.
- § 905. Exception as to estates abroad.
- § 906. Nor when they carry on business as trustees.
- Disbursements.
- § 907. A trustee may have a lien on the trust estate for his expenses.
- § 908. From what fund the expenses are to be paid.
- § 909. Trustee may call upon *cestui que trust* for expenses if the trust fund is insufficient.
- § 910. The general rule as to an allowance of his expenses.
- § 911. The trustee must keep an account of his expenses.
- § 912. He may employ necessary assistants.
- § 913. The expenses may depend upon the character of the trust, and the power and duties of the trustees.
- § 914. Trustees will be allowed for all accidental losses which happen without their fault.
- § 915. For what disbursements trustees may be allowed.
- § 915 a. Allowance for improvements.

## In United States.

- § 916. The English rule as to compensation for services, time, and trouble not acted upon in the United States.
- § 917. Trustees entitled to reasonable compensation. Rules in the various States.
- § 918. Rules and statutes in the various States. Note.
- § 919. Practice in various States.

§ 904. NOTHING is better established in England than that a trustee can have no allowance or compensation for his time and trouble in the execution of a trust.<sup>1</sup> The principle on which the rule is founded is, that a trustee can "make no profit out of his office;" and the reason of the principle is, that a trustee shall be placed in no position where his interest may be opposed to his duty.<sup>2</sup> The rule applies not only to

<sup>1</sup> *Robinson v. Pett*, 3 P. Wms. 251; 2 Lead. Cas. Eq. 206; *Brocksopp v. Barnes*, Cas. t. Finch, 361; *Ayliffe v. Murray*, 2 Atk. 58; *In re Ormsby*, 1 B. & B. 189; *Charity Corpo. v. Sutton*, 2 Atk. 406; *Bonithon v. Hockmore*, 1 Vern. 316.

<sup>2</sup> *New v. Jones*, cited in *Moore v. Frowd*, 3 M. & Cr. 50; *Burton v. Wookey*, 6 Madd. 368; *Hamilton v. Wright*, 9 Cl. & Fin. 111.

trustees strictly so called, but also to all who hold a fiduciary relation, as executors and administrators, mortgagees, receivers, guardians, and officers, directors and trustees of corporations.<sup>1</sup> If trustees render services to the trust estate in their professional characters, as solicitors, factors, brokers, bankers, or in any other capacity, they can receive no compensation or commissions for such services.<sup>2</sup> And if a bonus has been allowed them by the *cestui que trust* in the settlement of their accounts, the settlement may be set aside.<sup>3</sup>

§ 905. An exception to this rule has been established in the cases of trustees for absent owners of estates in the West Indies, of administrators of estates in the East Indies, and of mortgagees in possession of estates in Jamaica. Courts of chancery in England have allowed commissions as compensation for time and trouble in these instances.<sup>4</sup>

<sup>1</sup> Scattergood v. Harrison, Mose. 128; How v. Godfrey, Cas. t. Finch, 361; Sheriff v. Axe, 4 Russ. 33; Bonithon v. Hockmore, 1 Vern. 316; Langstaffe v. Fenwick, 10 Ves. 405; French v. Barron, 2 Atk. 120; Carew v. Johnston, 2 Sch. & Lef. 301; Arnold v. Garner, 2 Phil. 231; Matthison v. Clarke, 3 Drew. 3; Barrett v. Hartley, 12 Jur. 426; L. R. 2 Eq. 789; In re Ormsby, 1 B. & B. 189; Anon., 10 Ves. 103; Re Walker, 2 Phil. 630; Re Westbrooke, id. 631; York, &c. Railw. v. Hudson, 16 Beav. 485; Burden v. Burden, 1 V. & B. 170; Stocken v. Dawson, 6 Beav. 371; Kirkman v. Booth, 11 Beav. 273.

<sup>2</sup> Ibid.; New v. Jones, 1 Hall & Tw. 632; Broughton v. Broughton, 2 Sm. & G. 422; 5 De G., M. & G. 160; Gomley v. Wood, 3 J. & Lat. 702; 9 Ir. Eq. 418; Lincoln v. Winsor, 9 Hare, 158; Bainbrigge v. Blair, 8 Beav. 588; Todd v. Wilson, 9 Beav. 486; Lyon v. Baker, 5 De G. & Sm. 622; Collins v. Carey, 2 Beav. 129; Christophers v. White, 10 Beav. 523; Selatter v. Cottam, 3 Jur. (N. S.) 630; Matthison v. Clarke, 3 Drew. 3; In re Taylor, 18 Beav. 165.

<sup>3</sup> Barrett v. Hartley, L. R. 2 Eq. 789. Where provision is made by the settlement for the payment of a professional service by the trustee, the usual charges may be made and allowed for such service. Willis v. Kibble, 1 Beav. 559; Moore v. Frowd, 3 M. & Cr. 45; Douglass v. Archbutt, 2 De G. & J. 148; Frazer v. Palmer, 4 Y. & C. Ex. 515. Liberty to charge for professional services includes only services *strictly* professional. Harbin v. Darby, 28 Beav. 325.

<sup>4</sup> Chambers v. Goldwin, 5 Ves. 834; 9 Ves. 254, 257, 267, 273; For-

§ 906. Even where trustees are directed to carry on the testator's business, they can have no compensation for their time and trouble, unless there is a special provision in the will for their payment. The reason is that trustees can make no profit.<sup>1</sup> But a trustee under a constructive trust, who carries on business with another's property in such manner that he is compelled to account for the profits, may be allowed a compensation for his time and trouble, and for his skill in conducting the business.<sup>2</sup>

§ 907. The general rule is that the expenses of a trustee in the execution of the trust are a lien upon the estate, and he will not be compelled to part with the property until his disbursements are repaid.<sup>3</sup> But although this is the rule in regard to secular trusts where there is a *cestui* who ought in equity to reimburse the trustee, yet it is held that in case of a charitable trust, no lien can be allowed for advances made by the trustee even to pay off claims which would have been enforced as mechanics' liens against the building; at any rate where it appears that to allow the lien would defeat the object of the trust, and *the lien was not claimed by the trustee in his lifetime*.<sup>4</sup> The agent of the trustee is accountable to his principal only, and not to the *cestui que trust*; <sup>5</sup> therefore

rest *v. Elwes*, 2 Mer. 68; *Denton v. Davy*, 1 Moore, P. C. 15; *Hinchel v. Daly*, id. 51; *Grant v. Campbell*, id. 43; *Leith v. Irwin*, 1 M. & K. 277; *Chetham v. Audly*, 4 Ves. 72; *Matthews v. Bagshaw*, 14 Beav. 123; *Campbell v. Campbell*, 13 Sim. 168; 2 Y. & Col. Ch. 607; *Freeman v. Fairlee*, 3 Mer. 24, 28.

<sup>1</sup> *Stocken v. Dawson*, 6 Beav. 371; *Burden v. Burden*, 1 V. & B. 170; *Brocksopp v. Barnes*, 5 Madd. 90; *Marshall v. Holloway*, 2 Swanst. 432; *Forster v. Ridley*, 4 N. R. 417.

<sup>2</sup> *Brown v. De Tastet*, Jâc. 284; *Crawshay v. Collins*, 15 Ves. 225; *Wedderburn v. Wedderburn*, 22 Beav. 84; *Brown v. Litton*, 1 P. Wms. 140; 10 Mod. 20.

<sup>3</sup> *Ex parte James*, 1 D. & C. 272; *Hill v. Magan*, 2 Moll. 460; *Norwich Yarn Co.*, 22 Beav. 143; *Ex parte Chippendale*, 4 De G., M. & G. 19; *Trott v. Dawson*, 1 P. Wms. 780; *Bro. P. C.* 266; *Morison v. Morison*, 7 De G., M. & G. 226.

<sup>4</sup> *French v. Griswold College*, 60 Iowa, 482.

<sup>5</sup> *Myler v. Fitzpatrick*, 6 Madd. 360; *Att. Gen. v. Chesterfield*, 18 Beav.

an agent has no lien upon the trust estate.<sup>1</sup> (a) But an attorney who has collected trust funds for a trustee may set off his costs;<sup>2</sup> and where there is a particular direction to the trustees to employ a particular person in a particular capacity, such person will have a lien on the fund.<sup>3</sup> But a mere recommendation to the trustees to employ some person will not give the person employed a lien on the estate.<sup>4</sup> The trustee of a *void* deed cannot claim a lien upon the estate for his expenses against those who establish the fraudulent or invalid character of the deed,<sup>5</sup> though he may be allowed for improvements;<sup>6</sup> nor can a trustee have a lien for expenses incurred beyond the scope of his authority.<sup>7</sup> The trustee's lien cannot be allowed to control the estate in such manner as to destroy the trust; but no conveyance will be ordered or allowed until he is repaid.<sup>8</sup> Although agents of trustees have no lien upon the trust estate, and are not responsible to the *cestui que trust* as before stated, yet if they mix themselves up with a breach of trust, and by an abuse of their powers as simple agents obtain possession of the trust property, the *cestui que trust* may proceed against them as trustees *de son tort* or constructive trustees.<sup>9</sup> (b) If several estates

596; Langford v. Mahoney, 2 Conn. & Laws. 317; Lockwood v. Abdy, 14 Sim. 441; Kean v. Roberts, 4 Madd. 350.

<sup>1</sup> Worrall v. Harford, 8 Ves. 4; Hall v. Laver, 1 Hare, 571; Heriot's Hospital v. Ross, 12 Cl. & Fin. 507; Francis v. Francis, 5 De G., M. & G. 108; Re Sadd, 34 Beav. 650.

<sup>2</sup> Re Sadd, 34 Beav. 650.

<sup>3</sup> Williams v. Corbett, 8 Sim. 349; Hibbert v. Hibbert, 3 Mer. 681; Cousett v. Bell, 1 Y. & Col. Ch. 569.

<sup>4</sup> Shaw v. Lawless, 1 Ll. & G. t. Sugd. 154; 1 Dr. & W. 512; 5 Cl. & Fin. 129; Ll. & G. t. Plunk. 559; Finden v. Stephens, 2 Phil. 142; Knott v. Cottee, id. 192.

<sup>5</sup> Smith v. Dresser, L. R. 1 Eq. 651.

<sup>6</sup> Woods v. Axton, W. N. 207.

<sup>7</sup> Leedham v. Chawner, 1 K. & J. 458.

<sup>8</sup> Darke v. Williamson, 25 Beav. 622.

<sup>9</sup> Myler v. Fitzpatrick, 6 Madd. 360; Pollard v. Downes, 1 Eq. Cas.

(a) Johnson v. Leman, 131 Ill. 609; Steele v. Steele, 64 Ala. 438, 450. for the trust may make himself personally liable for goods which he authorizes his cotrustee to purchase.

(b) One trustee who acts as agent Brazier v. Camp, 63 L. J. Q. B. 257.

are subject to the same trusts, the proceeds of any one of the estates may be applied by the trustee to the payment of his expenses; but if several estates are subject to different trusts, in the hands of the same trustee, each estate must bear its own expenses.<sup>1</sup>

§ 908. Where a fund was created for the payment of *debts* and *funeral* and *testamentary expenses*, it was held that *administration* expenses were not embraced, and could *not* be paid from that fund.<sup>2</sup> There is, however, one case to the contrary.<sup>3</sup> But where the trusts were for the payment of "debts, testamentary, and *other* expenses and legacies;"<sup>4</sup> or to pay "funeral, testamentary, and *legal* expenses;"<sup>5</sup> or for the payment of "debts, funeral expenses, and the costs and charges of proving and attending the execution of the will and the several trusts therein named,"<sup>6</sup> it was held that the words were broad enough to embrace the payment of the costs of the administration of the trusts, and that such charges must be paid out of the fund so created. Where a testator bequeathed a leasehold estate and all his personal property to his wife, and devised his real estate to be sold, and the proceeds applied to the payment of his funeral and testamentary expenses and debts, and the residue invested, it was held that the funeral and testamentary expenses were thrown upon the real estate in exoneration of the personal, but that the costs of taking the opinion of the court upon a special

Ab. 6; *Fyler v. Fyler*, 3 Beav. 550; *Hardy v. Caley*, 33 Beav. 365; *Ex parte Woodin*, 3 Mont. D. & D. 399; *Alleyne v. Darcey*, 4 Ir. Eq. 199; *Pannell v. Hurley*, 2 Coll. C. C. 241; *Portlock v. Gardner*, 1 Hare, 166; *Bodenham v. Hoskyns*, 2 De G., M. & G. 903; *Att. Gen. v. Leicester*, 7 Beav. 176; *Morgan v. Stephens*, 3 Gif. 226.

<sup>1</sup> *Price v. Loaden*, 21 Beav. 508.

<sup>2</sup> *Brown v. Groombridge*, 4 Madd. 495; *Stringer v. Harper*, 26 Beav. 585; *Linley v. Taylor*, 1 Gif. 69; *Webb v. De Beauvoisin*, 31 Beav. 573; *Gilbertson v. Gilbertson*, 34 Beav. 354.

<sup>3</sup> *Wilson v. Heaton*, 11 Beav. 492.

<sup>4</sup> *Webb v. De Beauvoisin*, 31 Beav. 573.

<sup>5</sup> *Coventry v. Coventry*, 2 Dr. & Sm. 470.

<sup>6</sup> *Alsop v. Bell*, 24 Beav. 451, 463.



case were not testamentary expenses within the meaning of the will, but fell upon the personalty, which was specifically devised to the wife.<sup>1</sup> (a) So a trust created by will in both real and personal estate, to pay out of the personal the expenses of probate and the execution of the trusts, does not authorize the trustees to pay out of the personal any other expenses than *executors* would be authorized to pay in that character, and the trustees cannot discharge the expenses of the trust of the real estate out of the personal.<sup>2</sup>

§ 909. If the trust fund is insufficient for the reimbursement of the trustee, he may call upon the *cestui que trust* in whose behalf and at whose request he acted, and recover of him personally reasonable compensation for the time and trouble and money expended.<sup>3</sup> So trustees may call upon the *cestui que trust* for indemnity, before proceeding to incur expenses and liabilities.<sup>4</sup> But to enable trustees to enforce their claim for expenses against a *cestui que trust*, they must have proceeded strictly within the limits of their power, unless they have the express or implied promise of the *cestui que trust* to indemnify them.<sup>5</sup>

§ 910. Trustees have an inherent equitable right to be reimbursed all expenses which they reasonably and properly incur in the execution of the trust, and it is immaterial that there are no provisions for such expenses in the instrument of trust. (b) If a person undertakes an office for another in

<sup>1</sup> Gilbertson v. Gilbertson, 34 Beav. 354.

<sup>2</sup> Brougham v. Poulett, 19 Beav. 119; Sanders v. Miller, 25 Beav. 154.

<sup>3</sup> Balsh v. Hyham, 2 P. Wms. 453; *Ex parte* Chippendale, 4 De G., M. & G. 19, 54; Phené v. Gillam, 5 Hare, 913.

<sup>4</sup> Ibid.

<sup>5</sup> Leedham v. Chawner, 4 K. & J. 458; Collinson v. Lister, 20 Beav. 368.

(a) See Klotz's Estate (Penn.), expenses, and he has a lien therefor upon the trust property in his possession. 42 Atl. 477.

(b) A trustee is to be allowed for his reasonable disbursements and expenses. *In re* Bosworth, 58 L. J. Ch. 432; Perrine v. Newell, 49 N. J. Eq.

relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty.<sup>1</sup> And for losses that may accrue to himself in the proper administration of the trust.<sup>2</sup>(a) Thus a trustee will

<sup>1</sup> Worrall *v.* Harford, 8 Ves. 8; Att. Gen. *v.* Norwich, 2 M. & Cr. 406, 424; Rex *v.* Inhab. of Essex, 4 T. R. 591; Rex *v.* Com'rs, 1 B. & Ad. 232; Brocksopp *v.* Barnes, 5 Madd. 90; How *v.* Godfrey, t. Finch, 361; Heriot's Hospital *v.* Ross, 12 Cl. & Fin. 512; Caffrey *v.* Darby, 6 Ves. 497; *Re* Ormsby, 1 B. & B. 190; Godfrey *v.* Watson, 3 Atk. 518; Hyde *v.* Heywood, 2 Atk. 126; Dawson *v.* Clarke, 18 Ves. 254; Morison *v.* Morison, 7 De G., M. & G. 214; Morton *v.* Barrett, 22 Me. 257; Pennell's App., 2 Barr, 216; Morton *v.* Adams, 1 Strob. Eq. 76; Miller *v.* Beverleys, 4 Hen. & M. 415; Ames *v.* Downing, 1 Bradf. Sur. 331; Myers *v.* Myers, 2 McCord, Ch. 214; Miles *v.* Bacon, 4 J. J. Marsh. 457; Jones *v.* Dawson, 19 Ala. 672; Hatton *v.* Weems, 12 Gill & J. 83; Perkins *v.* Kershaw, 1 Hill, Eq. 350; Egbert *v.* Brooks, 3 Harring. 110; Love *v.* Morris, 13 Ga. 165; R. & S. R. R. Co. *v.* Miller, 47 Vt. 146.

<sup>2</sup> Jervis *v.* Wolferstan, L. R. 18 Eq. 18. A trustee for support of *cestui* is entitled to a lien upon the interest of his *cestui que trust*, for

57; Sherman *v.* Leman, 137 Ill. 94; must himself bear such expense. *Re* Foster *v.* Bailey, 157 Mass. 160; Chapman, 72 L. T. 66.

A trustee's accounting does not affect his responsibility for trust funds not included therein. Crampton *v.* Seymour, 67 Vt. 393. When in accounting a trustee is allowed interest on payments made from the rents received, he is also chargeable with interest on the rents received. Garvey *v.* Owens, 12 N.Y.S. 349. He is bound to collect interest due the estate, and is liable for neglect in so doing or for any similar negligence causing loss to the fund. Weisel *v.* Cobb, 118 N. C. 11; *In re* Nesmith, 140 N. Y. 609; Reynolds *v.* Sisson, 29 N. Y. S. 492; Griffith's Est., 147 Penn. St. 274; Mades *v.* Miller, 2 App. D. C. 455; McBride *v.* McIntyre, 100 Mich. 302; Williams *v.* Haskins, 66 Vt. 378.

(a) A trustee, though not appointed by a court but only by the

be reimbursed all his necessary travelling expenses,<sup>1</sup> and all reasonable fees paid for legal advice in the discharge of his duties.<sup>2</sup> And this rule will be applied, although the trust may subsequently be declared void,<sup>3</sup> if the trustees were without blame in the matter. So trustees will be allowed all the expenses of litigation concerning the fund, and all costs which they are ordered to pay to strangers, if the litigation was forced upon them, or was necessary for the protection of the estate;<sup>4</sup> but if a trustee is deprived of his costs, or ordered to pay costs by reason of his own misconduct, or if the suit was improperly instituted by him, he cannot be allowed for such disbursements, but he must bear them personally as a penalty for his misconduct.<sup>5</sup> Nor can a trustee be allowed his expenses in defending himself upon an inquisition of insanity.<sup>6</sup> Allowances for legal expenses and costs are always within the discretion of the court; and such claims can be modified and reduced, if in the judgment of the court they are unreasonable.<sup>7</sup> Interest upon such pay-advances to him before the estate can be sold. *Haydel v. Hurck*, 72 Mo. 253.

<sup>1</sup> *Ex parte Lovegrove*, 3 D. & C. 763; *Malcolm v. O'Callaghan*, 3 M. & C. 62; *Bridge v. Brown*, 2 Y. & Col. Ch. 181; *Ex parte Bray*, 1 Rose, 144; *Ex parte Elsee*, 1 Mont. 1; *Burr v. McEwen*, Baldw. C. C. 154; *Towle v. Mack*, 2 Vt. 19.

<sup>2</sup> *Cary*, 14; *McElhenny's App.*, 46 Penn. St. 347; *Wilson's App.*, 41 id. 94; *Brady v. Dilley*, 27 Md. 570; *McNamara v. Jones*, Dick. 587; *Fearns v. Young*, 10 Ves. 184; *Burge v. Brutton*, 2 Hare, 373; *Johnson v. Telford*, 3 Russ. 477; *Poole v. Pass*, 1 Beav. 604. But he cannot incur unnecessary counsel fees. *Holcomb v. Holcomb*, 2 Beav. 415; *Beatty v. Clark*, 20 Cal. 11.

<sup>3</sup> *Stewart v. McMinn*, 5 W. & S. 100; *Re Wilson*, 4 Penn. St. 430; *Hawley v. James*, 16 Wend. 61.

<sup>4</sup> See chapter on Costs.

<sup>5</sup> *Caffrey v. Darby*, 6 Ves. 497; *Peers v. Ceeley*, 15 Beav. 209; *Leedham v. Chawner*, 4 K. & J. 458.

<sup>6</sup> *Buckham v. Smith*, 55 Penn. St. 335.

<sup>7</sup> *Johnson v. Telford*, 3 Russ. 477; *Langford v. Mahony*, 5 Ir. Eq. 576.

owner of the property, is not liable personally under the U. S. Rev. Stats., § 5152, for the assessment collectible from the stockholders of an insolvent national bank. *Pauly v. State Loan & T. Co.*, 165 U. S. 606; *Lucas v. Coe*, 86 F. R. 972.

ments will not be allowed to a trustee, although he had no trust money in his hands at the time of the payment.<sup>1</sup> A trustee can receive pay only for such services and expenses as are within the line of the duties imposed on him by the instrument creating the trust.<sup>2</sup>

§ 911. A trustee ought to keep a regular account of his expenses, and if he does not do so, every intendment of fact will be made against him,<sup>3</sup> and the lowest estimate put upon his charges for expenses.<sup>4</sup> Thus in *Hethersell v. Hales*, the trustee made a charge of £2,500 for expenses, having kept no account; the court upon inquiry found that he had expended large sums, which might well amount to £2,500, but, as there was no regular account, it allowed only £2,000.<sup>5</sup> The court may reject the whole sum claimed as expenses where no account has been kept, and allow only such sums as are clearly proved by competent evidence,<sup>6</sup> and appear reasonable.

§ 912. A trustee may employ necessary assistants in executing the trust and pay them; thus he may employ agents, collectors, accountants, and other persons properly employed in similar affairs.<sup>7</sup> Even where a sum of money

He may be allowed for fees paid counsel employed to represent the trust estate, even though the *cestui* employed counsel to represent the same interest. *Clark v. Anderson*, 13 Bush (Ky.), 111. And for fees paid counsel to defend suit by *cestui que trust*, to have his accounts surcharged and corrected, although the account is to some extent successfully attacked. *Ibid.*

<sup>1</sup> *Gordon v. Trail*, 8 Price, 416.

<sup>2</sup> *Tracy v. Gravois R. Co.*, 84 Mo. 210.

<sup>3</sup> *Ex parte Cassell*, 5 Watts, 442; *Green v. Winter*, 1 Johns. Ch. 27.

<sup>4</sup> *McDowell v. Caldwell*, 2 McCord, Ch. 42.

<sup>5</sup> 2 Ch. R. 158.

<sup>6</sup> *Miller v. Whittier*, 36 Maine, 577; *Wistar's App.* 54 Penn. St. 54.

<sup>7</sup> *Wilkinson v. Wilkinson*, 2 S. & S. 237; *Henderson v. McIver*, 3 Madd. 275; *Davis v. Dendy*, id. 170; *Hopkinson v. Roe*, 1 Beav. 180; *Turner v. Corney*, 5 Beav. 515; *Weiss v. Dill*, 3 M. & K. 26; *Kennedy's App.*, 4 Penn. St. 150; *Parker v. Johnson*, 37 N. J. Eq. 368. In England the court will not allow more than two and one-half per cent to be paid to a

was given to trustees for their care and trouble, it was held that they might employ necessary collectors and agents, and pay for their services from the trust fund, and that the gift in the will was for their own care and trouble in overseeing and conducting the trust.<sup>1</sup> So the ordinary brokerage fees will be allowed for transferring stocks,<sup>2</sup> where a transfer is proper.<sup>3</sup> The concurrence of a cotrustee is not necessary for the incurring of expenses if the expenses are proper in themselves;<sup>4</sup> but if they are unnecessary, and are incurred against the protest of the *cestui que trust*, they will not be allowed by the court.<sup>5</sup>

§ 913. The disbursements that will be allowed to a trustee will depend very much upon the character of the trust and the directions given in the instrument of trust. (a) If he has a power of sale he will be allowed all the expenses of a sale.<sup>6</sup> If he has power of managing the estate, he will be entitled to all the expenses of keeping up the estate, such as hire of servants, salaries, taxes, cost of repairing, rebuilding

collector. *Weiss v. Dill*, 3 M. & K. 26; *Stackpole v. Stackpole*, 4 Dow, 226. Trustees incur personal liabilities toward third persons for services upon the trust estate, and actions at law may be maintained against them for such services; but third persons cannot maintain bills in equity against the trustee nor against the trust estate for such services. *Wade v. Pope*, 44 Ala. 690.

<sup>1</sup> *Wilkinson v. Wilkinson*, 2 S. & S. 237; *Webb v. Shaftesbury*, 7 Ves. 480; *Fountaine v. Pellett*, 1 Ves. Jr. 337.

<sup>2</sup> *Jones v. Powell*, 6 Beav. 485.

<sup>3</sup> *Weiss v. Dill*, 3 M. & K. 27. See *Hopkinson v. Roe*, 1 Beav. 183.

<sup>4</sup> *Miller v. Beverleys*, 4 Hen. & Munf. 415.

<sup>5</sup> *Berryhill's App.*, 3 Penn. St. 245.

<sup>6</sup> *Crump v. Baker*, 18 Ves. 285.

(a) What is a reasonable compensation for the collection of rents or royalties and their distribution depends largely upon the circumstances of each case and the custom of the locality. See *Dorrance's Estate*, 186 Penn. St. 64; *Roosevelt v. Van Alen*, 52 N. Y. S. 304; *Royal v. Royal*, 30 Oregon, 448; *Thomson v. Peake*, 38 S. C. 440. A trustee who retains, with the beneficiary's consent, trust money which he has collected, is not entitled to commissions thereon, as he does not disburse it. *Gregg v. Gabbert*, 62 Ark. 602.

farm-houses, manuring, draining, fencing, and other expenses of that kind.<sup>1</sup> If, however, there is a tenant for life entitled to the possession of the estate, the trustee can expend no part of the general fund upon the estate unless he is specially directed to do so.<sup>2</sup> But if the trustee is to reside upon the estate, he will be allowed all the ordinary expenses of living.<sup>3</sup> He cannot, however, be allowed for a park-keeper, or for keeping up a mere pleasure establishment, nor for pulling down and rebuilding houses.<sup>4</sup>

§ 914. If a trustee uses proper care in the custody of the trust property, and it is stolen from him, he will not be responsible; but the amount so lost may be allowed in his accounts.<sup>5</sup> So if the funds are properly deposited in a bank or with a banker, and the money is lost by the failure of the bank, the trustee may be allowed such loss in his accounts.<sup>6</sup> If the settlor directs the employment of a particular person, and any part of the trust fund is lost by him without the fault of the trustee, such sum will be allowed.<sup>7</sup> So if investments are made according to the directions of the donor or settlor, or according to law in good faith, trustees will be allowed for any loss which may happen from such investments if they use due diligence in protecting such investments from danger.<sup>8</sup> In some cases it has been held that a

<sup>1</sup> *Fountaine v. Pellett*, 1 Ves. Jr. 337; *Bridge v. Brown*, 2 Y. & C. Ch. 181; *Webb v. Shaftesbury*, 7 Ves. 480; *Bowes v. Strathmore*, 8 Jur. 92.

<sup>2</sup> *Ibid.*; *Bostock v. Blakeney*, 2 Bro. Ch. 653; *Hibbert v. Cook*, 1 S. & S. 552; *Nairn v. Majoribanks*, 3 Russ. 582; *Caldicott v. Brown*, 2 Hare, 144; *Jones v. Dawson*, 19 Ala. 673.

<sup>3</sup> *Fountaine v. Pellett*, 1 Ves. Jr. 337.

<sup>4</sup> *Ibid.*; *Webb v. Shaftesbury*, 7 Ves. 480; *Bridge v. Brown*, 2 N. C. C. 191.

<sup>5</sup> *Morley v. Morley*, 2 Ch. Cas. 2; *Knight v. Plymouth*, 3 Atk. 480; 1 Dick. 120; *Jones v. Lewis*, 2 Ves. 240; *ante*, § 441; *Neff's App.*, 57 Penn. St. 91; *Campbell v. Miller*, 38 Ga. 304.

<sup>6</sup> *Ibid.*; *Routh v. Howell*, 3 Ves. 564; *Adams v. Claxton*, 6 Ves. 626; *Freeme v. Woods*, 1 Taml. 172; *Massey v. Banner*, 4 Madd. 416; *Belcher v. Parsons*, Amb. 219; *Clough v. Bond*, 3 M. & Cr. 290.

<sup>7</sup> *Kilbee v. Sneyd*, 2 Moll. 199; *Doyle v. Blake*, 2 Sch. & Lef. 239.

<sup>8</sup> *Watson v. Stone*, 40 Ala. 451; *Dockey v. McDonald*, *id.* 476; *Neilson v. Cook*, *id.* 498.

trustee receiving a stipulated commission or compensation is liable, upon the same principles that a bailee for hire is liable.<sup>1</sup> But the more common rule is, that trustees are liable only for *good faith* and common prudence, and that if a loss happens to the trust fund in relation to which they have exhibited this care and prudence, they may be allowed for the loss in their accounts.<sup>2</sup> A loss that happens through the negligence of the trustee must be borne by him.<sup>3</sup> But where a trustee properly employed a servant to fell trees upon the trust estate, and the servant carelessly felled a tree upon a third person, who recovered a judgment against the trustee for the injury, the amount was allowed to the trustee in his account.<sup>4</sup> The loss may be proved by the affidavit of the trustee.<sup>5</sup>

§ 915. What the court will allow upon suit may be done by the trustee without suit.<sup>6</sup> Thus any disbursements which the court would order the trustee to make will be allowed to the trustee, if he makes them without an order; and expenditures for the good of the estate may be allowed to him: (a) as,

<sup>1</sup> *Ex parte Cassell*, 3 Watts, 442.

<sup>2</sup> *Chaplin v. Givens*, Rice, Eq. 132; *Mikel v. Mikel*, 5 Rich. Eq. 442; *Bryant v. Russell*, 23 Pick. 546; *Nyce's Est.*, 5 W. & S. 254; *Twaddell's App.*, 5 Barr, 15; *Sollee v. Croft*, 7 Rice, Eq. 46; *Gray v. Lynch*, 8 Gill, 403; *Neff's App.*, 57 Penn. St. 91; *King v. King*, 37 Ga. 205; *Campbell v. Miller*, 3 Ga. 304.

<sup>3</sup> *Litchfield v. White*, 3 Seld. 444.

<sup>4</sup> *Bennett v. Wyndham*, 4 De G., F. & J. 259; *Duncan v. Findlater*, 6 Cl. & Fin. 894; *Heriot's Hosp. v. Ross*, 12 C. L. & Fin. 517; *Mersey Docks Trustee v. Gibbs*, 11 H. L. Cas. 686; L. R. 1 H. L. 93.

<sup>5</sup> *Morley v. Morley*, 2 Ch. Cas. 2; *Furman v. Coe*, 1 Caines' Cas. in Er. 96.

<sup>6</sup> *Balsh v. Higham*, 2 P. Wms. 453; *Gray v. Lynch*, 8 Gill, 403; *Hutton v. Weems*, 12 G. & J. 83; *Gibson v. Bott*, 7 Ves. 150; *Lee v. Brown*, 4 Ves. 369; *Bath v. Bradford*, 2 Ves. 590; *Cooks v. Parsons*, Pr. Ch. 185; *Inwood v. Twyne*, 2 Eden, 153; *Hutcheson v. Hammond*, 3 Bro. Ch. 145; *Terry v. Terry*, Gilb. 11; *Shaw v. Borrer*, 1 Keen, 576; Co. Litt. 171 a.

(a) In *Gisborn v. Charter Oak* Mr. Justice Brewer, in delivering Life Ins. Co., 142 U. S. 326, 337, the opinion of the court, said that,

where he buys in a burdensome lease;<sup>1</sup> or pays off an incumbrance,<sup>2</sup> or buys in an outstanding title for the benefit of the estate,<sup>3</sup> or defends the title at law or secures it against a tax title<sup>4</sup> (but not when he defends a suit he should have avoided),<sup>5</sup> or makes any other advances, for the benefit of the trust estate.<sup>6</sup> So trustees may expend moneys for the support of an infant, if the court shall subsequently approve of the expenditure;<sup>7</sup> and he may disburse money for the protection of an adult *cestui que trust*, where he is insane or otherwise incompetent to take care of himself;<sup>8</sup> and in some cases he is bound to do so.<sup>9</sup> Advances to the *cestui que trust* on the faith of the estate may be allowed to the trustee as against creditors.<sup>10</sup> But the trustee must show that articles furnished were of the value charged, and that he made no profit from the transactions.<sup>11</sup>

<sup>1</sup> *Fountaine v. Pellett*, 1 Ves. Jr. 343.

<sup>2</sup> *Murray v. De Rottenham*, 6 Johns. Ch. 62; *Freeman v. Tompkins*, 1 Strob. 53; *Pennell's App.*, 2 Penn. St. 216; *Mathews v. Dragaud*, 3 Des. 25.

<sup>3</sup> *King v. Cushman*, 41 Ill. 31; *Fischbeck v. Gross*, 112 Ill. 288.

<sup>4</sup> *Wagenseller v. Prettyman*, 7 Brad. (Ill.) 192.

<sup>5</sup> *Page v. Boynton*, 63 N. H. 190.

<sup>6</sup> *Altimus v. Elliott*, 2 Penn. St. 62.

<sup>7</sup> *Barlow v. Grant*, 1 Vern. 255; *Franklin v. Greene*, 2 Vern. 137; *Sisson v. Shaw*, 9 Ves. 285; *Prince v. Hine*, 26 Beav. 634. See *Lewin*, 419.

<sup>8</sup> *Nelson v. Duncombe*, 9 Beav. 211; *Chester v. Rolfe*, 4 De G., M. & G. 798; *Leonard v. Powell*, 41 Ga. 598.

<sup>9</sup> *Leonard v. Powell*, 41 Ga. 598.

<sup>10</sup> *Iredell v. Langston*, 1 Dev. Eq. 392; *Balsh v. Higham*, 2 P. Wms. 455; *Att. Gen. v. Norwich*, 2 M. & C. 424; *Att. Gen. v. Pearson*, 2 Col. C. C. 581; *Quarrell v. Beckford*, 1 Madd. 282; *Sandon v. Hooper*, 6 Beav. 246; *Bright v. North*, 2 Phil. 216.

<sup>11</sup> *Cleveland v. Pollard*, 37 Ala. 556; 1 Ala. (S. C.) 481.

in mining, it is not a trustee's duty vested in the trustee to make some to stop work the moment a vein is limited exploration to see if the lost lost, and that, though it could not vein could not be recovered, and be foretold in advance how great that reasonable expenses thus incurred had been the displacement, it was a incurred are chargeable upon the trust reasonable exercise of the power estate.



§ 915 *a*. Where a defendant is a trustee *e maleficio* and has made valuable improvements, he shall be allowed one-half, not of their cost, but of the permanent value they have added to the premises.<sup>1</sup> (*a*)

§ 916. The English rule as stated in *Robinson v. Pett*,<sup>2</sup> that trustees can have no compensation for time and trouble, was cited with approbation by Chancellor Kent in two early cases, and enforced with his usual clearness and vigor;<sup>3</sup> and in the State of Delaware that rule is applied in all cases.<sup>4</sup> And perhaps the same rule prevails in Ohio and Illinois. (*b*)

§ 917. But this is the extent of the application of the rule in the United States. It has been said, that "the state of our country and the habits of our people are so different as to have induced the legislatures of nearly all the States to introduce provisions by statute for competent remuneration to those to whom the law commits the care and charge of the estate of infants and deceased persons, and the courts make a reasonable allowance to receivers appointed by them, beside reimbursing their expenses; . . . and the equity of the statute is by construction generally extended to conventional trustees where the agreement is silent."<sup>5</sup> Mr. Story said, that "the policy of the law ought to be such as to induce honorable men, without a sacrifice of their private interests, to accept the office, and to take away the temptation to abuse the trust for mere selfish purposes, as the only indemnity for services of an important and anxious character."<sup>6</sup> These views have received the sanction of the courts and the

<sup>1</sup> *Thornton v. Ogden*, 41 N. J. Eq. 346.

<sup>2</sup> *Robinson v. Pett*, 3 P. Wms. 132; 2 Eq. Cas. Ab. 454.

<sup>3</sup> *Green v. Winter*, 1 Johns. Ch. 37; *Manning v. Manning*, id. 534.

<sup>4</sup> *Egbert v. Brooks*, 3 Harring. 112; *State v. Platt*, 4 Harring. 154.

<sup>5</sup> *Boyd v. Hawkins*, 2 Dev. Eq. 334.

<sup>6</sup> 2 Story, Eq. Jur. § 1268, n.

(*a*) As to improvements, see *Case v. Kelly*, 133 U. S. 21; *Stevens v. Melcher*, 152 N. Y. 551. *vided for in the trust instrument, or in the order of court appointing them.* *Cook v. Gilmore*, 133 Ill. 139; *Buckingham v. Morrison*, 136 Ill. 437.

(*b*) In Illinois, trustees are not allowed compensation when not pro-

legislatures of nearly all the States; and trustees are now entitled to compensation for their time and trouble, either in the form of a commission upon the property under their care, or of a gross sum allowed to them as compensation for their services,<sup>1</sup> but they must never speculate on the *cestui*.<sup>2</sup> (a)

§ 918. The general principle prevails in all the States except Delaware, and perhaps Ohio and Illinois, that trustees are to have a reasonable compensation for their time, trouble, and skill in managing the fund and in executing the trust, although there is some diversity in the manner of determining the amount.<sup>3</sup> In the larger number of States, the com-

<sup>1</sup> *Barney v. Saunders*, 16 How. 542; *Shirley v. Shattuck*, 6 Cush. (Miss.) 26; *Robinson v. Pett*, 2 Lead. Cas. Eq. 436, 473 (Amer. notes); *Clark v. Platt*, 30 Conn. 282.

<sup>2</sup> *Sutton v. Myrick*, 39 Ark. 431.

<sup>3</sup> In Maine, there is allowed one dollar for every ten miles' travel to

(a) Commissions properly vary according to the services rendered and the profits made for the estate. See, *e. g.*, *Weisel v. Cobb*, 118 N. C. 11; *Gallagher v. Yosemite M. Co.*, 10 Utah, 189; *Cobb v. Fant*, 36 S. C. 1; *Reese v. Meetze*, 51 S. C. 333; *Marks v. Semple*, 111 Ala. 637; *In re Smith*, 44 W. R. 270. Commissions cannot be based upon estimated values; values cannot be estimated in order to fix commissions in advance of conversion into money; nor can commissions be allowed on unsold lands. *McAlpine v. Potter*, 126 N. Y. 285, 290; *Bennett's Estate*, 38 N. Y. S. 945. See *In re Gill*, 47 id. 706; *Cornell's Estate*, 44 id. 585; *Maginn v. Green*, 67 Mo. App. 616; *Thou-ron's Estate*, 182 Penn. St. 126.

When there has been neglect or unfaithfulness on the part of the trustee, he is not usually allowed commissions, though these are pro-

vided for in the trust instrument. *Welsh v. Brown*, 50 N. J. Eq. 387; *Dufford v. Smith*, 46 id. 216; *Stevens v. Melcher*, 152 N. Y. 551; *In re Thompson*, 101 Cal. 349; *Brooks v. Jackson*, 125 Mass. 307; *In re Fitzgerald*, 57 Wis. 508; *Lehman v. Rothbarth*, 159 Ill. 270.

As to compensation for extraordinary services, see *supra*, § 432, n.

Double commissions will not be allowed, on a sale of realty. *Spencer v. Spencer*, 56 N. Y. S. 460; *Lathrop v. Baubie*, 106 Mo. 470. Or to the trustee and his agent. *Marks v. Semple*, 111 Ala. 637; *Cox v. Bennett*, 39 W. R. 308. But when the same person is both trustee and executor, he may be allowed commissions in both capacities. *Curtis's Estate*, 87 N. Y. S. 586; *Bennett's Estate*, 38 id. 945; *Old's Estate*, 150 Penn. St. 529; *Wooden v. Kerr*, 91 Mich. 188.

pensation is determined by a percentage or commission upon the trust fund, and this commission varies somewhat in the

and from court, and one dollar for each day's attendance, and a commission at the discretion of the court, not exceeding five per cent on the amount of the personal assets, together with reasonable sums paid for professional aid, regard being had to the nature and difficulty of the trust. Rev. Stat. 1857, c. 116, § 16.

In New Hampshire, compensation is within the discretion of the court, and it is usually made up from the expenses of attending court, a *per diem* allowance at court, and commissions varying from two to five per cent. Wendell v. French, 19 N. H. 210; Tuttle v. Robinson, 33 N. H. 118. The court has declined to allow a commission upon the value of specific articles delivered to a specific legatee. Gordon v. West, 8 N. H. 444. But an executor who, being an attorney at law, has rendered valuable services to the estate in that capacity, has been held to be entitled to adequate compensation for such services. Wendell v. French, 19 N. H. 210. If the damage to the trust by fault of the trustee is greater than the benefit derived from his services, he is entitled to no compensation. Judge of Probate v. Jackson, 58 N. H. 458.

In Vermont, all expenses will be allowed, and such fees for services as the law provides. Rev. Stat. c. 53, § 12; Hubbard v. Fisher, 25 Vt. 542. A gross sum in addition to expenses has been allowed. Evarts v. Nason, 11 Vt. 122.

In Massachusetts, trustees are allowed their reasonable expenses, and such compensation as the courts may order. Gen. Stat. c. 98, § 10. In Burrell v. Joy, 16 Mass. 229, five per cent upon the gross amount of property coming into their hands was allowed. Denny v. Allen, 1 Pick. 147; Jenkins v. Eldridge, 3 Story, 225; Longley v. Hall, 11 Pick. 124; Ellis v. Ellis, 12 Pick. 183; Gibson v. Crehore, 5 Pick. 161. The amount is within the discretion of the court, and may be varied to meet the requirements of each case. Scudder v. Crocker, 1 Cush. 382; Dixon v. Homer, 2 Met. 422; Blake v. Pegram, 101 Mass. 592. And the agreement made with the *cestui que trust* in relation to compensation, if no undue advantage is taken, will be considered in determining the amount of compensation. Pierce v. Bowker, 130 Mass. 262. A trustee under an assignment for creditors cannot charge a commission for selling the property, etc., not provided for in the agreement. Moors v. Wyman, 146 Mass. 60, 64. The commission charged by brokers for the change of investments must be paid out of the income. Heard v. Eldredge, 109 Mass. 258.

In Connecticut, the matter of compensation is wholly within the discretion of the court: Cantfield v. Bostwick, 21 Conn. 555; Kendall v. New Eng. Carpet Co., 13 Conn. 392; and a fair compensation will be allowed. Clark v. Platt, 30 Conn. 282.

In New York, the compensation of executors and guardians is estab-

different States. In some States, a gross sum is allowed for time and trouble; and in others a *per diem* compensation

lished by statute at five per cent upon the first one thousand dollars, two and one-half per cent upon the next nine thousand dollars, and one per cent upon all above those amounts. 2 Rev. Stat. 93; see vol. 6, Gen. Stat. N. Y.; c. 362, § 8, Acts of 1863; and c. 115, Acts of 1866; *Matter of Roberts*, *In re*, 3 Johns. Ch. 43; and see *id.* 630. They are to be allowed all their reasonable expenses in addition. 3 Rev. Sts. 180 (ed. 1859); *Dakin v. Demming*, 6 Paige, 95. These provisions are extended to trustees. *In re Roberts*, 3 Johns. Ch. 43; *Meacham v. Sterns*, 9 Paige, 403; *Livingston's Case*, *id.* 442; *Jewett v. Woodward*, 1 Edw. Ch. 199. Compensation to trustees is to be computed upon the whole property, real and personal. *De Peyster's Case*, 4 Sandf. Ch. 514; *Waggstaffe v. Lowerre*, 23 Barb. 224. These commissions to trustees include all allowances for expenses. *Stevenson v. Maxwell*, 2 Sandf. Ch. 284; *Griffin v. Barney*, 2 Comst. 372; *Nichols v. McEwen*, 21 Barb. 66. If a deed of trust should make a larger provision for compensation, it will not be allowed. *Griffin v. Barney*, 2 Comst. 372. And an assignment in trust for creditors was held to be void, for the reason that it provided for the expenses of the trustees in addition to their commissions. *Nichols v. McEwen*, 21 Barb. 66. But if a trustee undertakes a trust from motives of friendship and kindness, no commissions can be allowed. *Mason v. Rosevelt*, 5 Johns. Ch. 534; *Wetmore v. Brown*, 37 Barb. 133. The compensation is confined to commissions, and it cannot be allowed as a gross sum, or as a *per diem* charge. *M'Whorter v. Benson*, Hopk. 28; *Vanderheyden v. Vanderheyden*, 2 Paige, 288; *Valentine v. Valentine*, 3 Barb. Ch. 438. But see *Jewett v. Woodward*, 1 Edw. Ch. 199. This compensation is a matter of right under the statutes, and not of discretion. *Vanderheyden v. Vanderheyden*, 2 Paige, 288; *Rapalje v. Hall*, 1 Sandf. Ch. 406; *Meacham v. Sterns*, 9 Paige, 405; *Cairns v. Chaubert*, *id.* 161; *Morgan v. Hannas*, 49 N. Y. 667. But care will be taken not to allow double commissions when the estate is transferred from one trustee to another. *Jones's Case*, 4 Sandf. Ch. 616; *Kellogg's Case*, 7 Paige, 267; *Hosack v. Rogers*, 9 Paige, 468; *Valentine v. Valentine*, 3 Barb. Ch. 438; *White v. Bullock*, 20 Barb. 99. As to commissions in cases of constructive trust, see *Cowing v. Howard*, 46 Barb. 579; *Duffy v. Duncan*, 32 Barb. 587; *Slocomb v. Barry*, 38 N. Y. 46; *Ogden v. Murray*, 39 N. Y. 202. The compensation of receivers appointed by the courts is not governed by these rules, but the courts may determine such compensation in their own discretion. *Gardiner v. Tyler*, 2 N. Y. Dec. 247. Nor are trusts created by instruments between the parties within these rules. In such case the court will determine the compensation judicially. *In re Schell*, 53 N. Y. 263. Persons who are trustees and also executors will be allowed commissions in each capacity: *Phoenix v. Livingston*, 101 N. Y. 451; *In re Mason*, 98 N. Y. 527; *Laytin*

is made for time, travel, and labor. In many States, the percentage or commissions are established by statutes; in

*v. Davidson*, 29 Hun, 622, where the offices are distinguishable. *Hurlburt v. Durant*, 88 N. Y. 121; *In re Jackson*, 32 Hun, 202; *Blake v. Blake*, 30 Hun, 471. If, however, the two functions are inseparable, double commissions will not be allowed. *Johnson v. Lawrence*, 95 N. Y. 154. Statutory fees are due trustees without regard to the amount of labor they have done; but if a trustee resigns, his compensation may be determined by the court as a part of the terms of his release. *In re Allen*, 96 N. Y. 327; 29 Hun, 7. Commissions of a trustee removed. See *In re Baker*, 35 Hun, 272.

In New Jersey, previous to 1855, there was great confusion as to the compensation of executors, trustees, and other fiduciary officers. See *Voorhees v. Stoothorf*, 6 Hals. 149; *Jackson v. Jackson*, 2 Green, Ch. 113; *Worbass v. Armstrong*, 2 Stockt. Ch. 263; *State Bank v. Marsh*, Saxt. 296; *Mathis v. Mathis*, 3 Harrison, 67; *Stevenson v. Phillips*, 1 Zab. 71; *Lloyd v. Rowe*, Spencer, 685. The statute of that year provided that the commissions of trustees, over and above their necessary expenses, should not exceed seven per cent upon the first thousand dollars, four per cent on the next four thousand dollars, three per cent on the next five thousand dollars, and two per cent upon all sums above ten thousand dollars, provided that all allowances shall not exceed one-fifth of the estate. *Nixon's Dig.* 562, Act of 1855, §§ 9, 10. One who is executor and trustee will be allowed reasonable compensation in each capacity. *Pitney v. Everson*, 42 N. J. Eq. 361, and *Everson v. Pitney*, 40 id. 539. For various considerations relating to this subject, see *Gilmore v. Tuttle*, 34 N. J. Eq. 45. The trustee may forfeit his compensation by misconduct, but in such case he may be allowed compensation for the value to the estate of any services performed by him. *Blauvelt v. Ackerman*, 23 N. J. Eq. 495; *McKnight v. Walsh*, id. 136; *Lathrop v. Smalley*, id. 192; *Moore v. Zabriskie*, 3 Green, 51.

In Delaware, a voluntary trustee is not entitled to compensation, but will be allowed expenses and saved from loss. *Brooks v. Egbert*, 2 Del. Ch. 83.

In Pennsylvania, by a statute June 14, 1836, it was made lawful for the court to allow such compensation to trustees as shall be just and reasonable. The courts had always allowed compensation under an act passed in 1713. *Wilson v. Wilson*, 3 Binn. 560; *Anderson v. Neff*, 11 S. & R. 218; *Heckert's App.*, 24 Penn. St. 486; *Prevost v. Gratz*, 3 Wash. C. C. 434. The courts of Pennsylvania hold, however, that compensation is a matter of judicial and equitable discretion, and that they may withhold it if there is any misconduct on the part of the trustee. *Walker v. Walker*, 9 Wall. 743; *Ex parte Cassel*, 3 Watts, 443; *Swartswalter's Acct.*, 4 Watts, 79; *Hermstead's App.*, 60 Penn. St. 423; *Berryhill's App.*, 35 id. 245;

others, the rates are adjusted upon equitable principles. These statutes generally refer to the fees or compensation of

Robenett's App., 38 id. 112; Witman's App. 28 id. 373; Raybold v. Raybold, 20 id. 308; Stehman's App., 5 Barr, 414; Dyott's Est., 2 W. & S. 566; Say v. Barnes, 4 S. & R. 116; Aston's Est., 4 Whart. 240; Fournier v. Ingraham, 7 W. & S. 31; Bell's Est., 2 Pars. Eq. 200; Drysdale's App., 14 Penn. St. 537; McCahan's App., 7 id. 59; Norris's App., 71 id. 106; Carrier's App., 79 id. 230. This rule was applied to deprive an attorney of his commissions where he withheld for a long time money collected. Bredin v. Kingland, 4 Watts, 420. But a trustee will not be deprived of his commission for a mistake in judgment. Meyer's App., 62 Penn. St. 109. The general practice is to allow compensation by commissions, and five per cent is the ordinary rule. Pusey v. Clemson, 9 S. & R. 209; Hemphill's Est., 1 Pars. Eq. 31; Bird's Est., 2 Pars. Eq. 171; Pennell's App., 2 Penn. St. 216; Wood's App., 86 id. 346. But the amount is under the control and discretion of the court, and it may give more or less as circumstances require. Pusey v. Clemson, 9 S. & R. 209; Marsteller's App., 4 Watts, 268; Harland's App., 5 Rawle, 331; Stephenson's Est., 4 Whart. 104; Walker's Est., 9 S. & R. 225; Miller's Est., 1 Ash. 335; Green's Est., id. 317; Nathans v. Morris, 4 Whart. 389; Shunk's App., 2 Penn. St. 307; Perkin's App., 108 id. 314. Double commissions will not be allowed. Aston's Est., 4 Whart. 241; Stevenson's Est., 1 Pars. Eq. 19. Nor commissions on reinvestments. Barton's Est., 1 Pars. Eq. 29; Trustees of Hemphill, id. 31; Hemphill's App., 18 Penn. St. 303. Nor interest on commissions. Armstrong's Est., 6 Watts, 286; Callaghan v. Hall, 1 S. & R. 241; Say v. Barnes, 4 S. & R. 116. There can be but one compensation, however numerous the trustees. Stevenson's Est., 1 Pars. Eq. 19. Where a testator directed his trustees to pay the interest upon a fund set apart to his widow, it was held that the trustees could not withhold a part of the income of such fund as commissions. Solliday v. Bisset, 2 Jones, 347; but the late case, Spangler's App., 21 Penn. St. 33, is inconsistent with the first case. Professional and extra services of a trustee may be compensated: Lowrie's App., 1 Grant, Ca. 373; but not services rendered necessary by the trustee's own wrong. Stearley's App., 38 Penn. St. 525. If an investment remains as it was left by the testator, the trustee can have commissions only on the income. McCauseland's App., 88 Penn. St. 466; Luken's App., 47 id. 356; Myer's App., 62 id. 104. The reckoning by a percentage is, however, used only for its convenience; the question is not one of percentage, but compensation for responsibility incurred and labor expended. Montgomery's App., 86 Penn. St. 230. The fact that the trustee has rendered informal semi-annual accounts to the *cestui que trust* without deducting commissions will not estop him from claiming them in his final account. Wistar's App., 86 Penn. St. 160. For sales of real estate two and a half per cent.

executors, administrators, and guardians; but the courts by equitable construction have extended their provisions to

Carrier's App., 79 Penn. St. 230. And three per cent for special service about the sale. Snyder's App., 54 Penn. St. 69; Robb's App., 41 id. 49.

In Maryland, the court had power, by the act of 1798, to vary executors' commissions from five to ten per cent on the amount of the inventory. *Scott v. Dorsey*, 1 Har. & J. 232. And he must pay a tax of ten per cent to the State upon such commissions. Act of 1844, c. 187; *William v. Mosher*, 6 Gill, 454. The right to this compensation is absolute: *McKim v. Duncan*, 4 Gill, 72, and extends to trustees. *Ringgold v. Ringgold*, 1 Har. & G. 27; *Nicholls v. Hodges*, 1 Pet. 565; *West v. Smith*, 8 How. 411; *Abbott v. Baltimore, &c. Packet Co.*, 4 Md. Ch. 315; *Mitchell v. Holmes*, 1 Md. Ch. 287. Commissions for the sale of lands by order of the court are established by rules of court at seven per cent on the first hundred dollars, six per cent on the second, five on the third, four on the fourth, three and a half on the fifth and sixth, three on the seventh and eighth, two and one-half on the ninth and tenth, and three per cent on all above \$3,000, in addition to all expenses not strictly personal. *Gibson's Case*, 1 Bland, 147. A *per diem* allowance is not favored, but the courts are liberal in allowing for expenses. *Ringgold v. Ringgold*, 1 Har. & G. 27; *Diffenderfer v. Winter*, 3 G. & J. 347; *Jones v. Stockett*, 2 Bland, 417; *Chace v. Lockerman*, 11 G. & J. 185; *Compton v. Barnes*, 4 Gill, 57; *Green v. Putney*, 1 Md. Ch. 267; *Dorsey v. Dorsey*, 10 Md. 471; 6 Md. 460; *Ex parte Young*, 8 Gill, 287; *Northern C. R. Co. v. Keighler*, 29 Md. 572. Reasonable commissions are allowed to the estate of a trustee deceased before the completion of the trust. Trustees appointed by the court will receive only the statute commissions, notwithstanding a provision in the deed creating the trust, that the original trustees shall receive a larger compensation. *Widener v. Fay*, 61 Md. 273. By analogy to the statute allowing commissions to executors, &c., allowances of commissions are made to conventional trustees, although not provided in the instrument. *Sanderson v. Pearson*, 45 Md. 483. Commissions are charged on the gross income. *Willson v. Tyson*, 61 Md. 575; see Md. decisions, *Jenkins v. Whyte*, 62 Md. 427.

In Virginia, the courts allow a commission of five per cent upon the receipts. *Granberry v. Granberry*, 1 Wash. 246; *Taliaferro v. Minor*, 2 Call, 197; *Miller v. Beverleys*, 4 Hen. & M. 420; *Triplett v. Jameson*, 2 Munf. 242; *Hipkins v. Bernard*, 4 Munf. 83; *Kee v. Kee*, 2 Grat. 132; *Waddy v. Hawkins*, 4 Leigh, 458. Trustees to sell real estate may have the same commission. *Lyons v. Byrd*, 2 Hen. & Munf. 22; *Deanes v. Scriba*, 2 Call, 416. But in cases where the duties of the trustees have been long and arduous, and the care and responsibility great, a larger sum has been allowed. *Fitzgerald v. Jones*, 1 Munf. 156; *McCall v. Peachey*,

trustees and others performing fiduciary duties. But if it appears, from the instrument of trust or otherwise, that it

3 Munf. 306; *Hipkins v. Bernard*, 4 Munf. 93; *Farneyhough v. Dickerson*, 2 Rob. 589; *Cavendish v. Fleming*, 3 Munf. 201.

In North Carolina, trustees may be allowed a sum not exceeding five per cent, together with their necessary disbursements. This sum is under the control of the court, and may be reduced, but not enlarged. *Hodge v. Hawkins*, 1 Dev. & Bat. 567; *Bond v. Turner*, 2 Taylor, 125; *Peyton v. Smith*, 2 Dev. & Bat. 349; *Walton v. Avery*, id. 405; *Turnage v. Green*, 2 Jones, Eq. 66. And commissions are allowed, although trustees are so much at fault that they are charged with compound interest. *Peyton v. Smith*, 2 Dev. & Bat. 325; *Thompson v. McDonald*, id. 471. And although the trustees have legacies, unless the legacies are given in place of commissions. *Oden v. Windley*, 2 Jones, Eq. 445. But *Arnold v. Byard*, 2 Dev. Eq. 4, seems to imply that commissions would not be paid to a trustee who misconducts himself, nor where regular accounts are not kept. *Finch v. Raynad*, 2 Dev. Eq. 141. These rules apply to trustees, as well as to executors and guardians. *Boyd v. Hawkins*, 2 Dev. Eq. 211, 334; *Sheril v. Shuford*, 6 Ired. Eq. 228; *Raiford v. Raiford*, id. 495; *Ingram v. Kirkpatrick*, 8 Ired. Eq. 62. A trustee *de son tort* will not be allowed commissions. *Hagler v. McCombs*, 66 N. C. 345. A provision in the trust-deed for compensation gives the trustee no lien on the property. *Trust Co. v. Railroad*, 99 N. C. 139.

In South Carolina, a commission of two and one-half per cent is allowed as compensation by statute, and the courts disclaim any discretionary power over it. But if the rate of compensation is named in the instrument of trust, the statute has no application. *College of Charleston v. Wellington*, 13 Rich. Eq. 195; 1 Rev. Dig. 392. Ten per cent is allowed upon the income of all sums at interest. These sums embrace all personal expenses, so that all charges for travel are disallowed. Act of 1789; *Ex parte Witherspoon*, 3 Rich. Eq. 14; *Norton v. Gillison*, 4 Rich. Eq. 219; *Logan v. Logan*, 1 McCord, Ch. 5; *Snow v. Callum*, 1 Des. 542. Though where executors were obliged to travel to Cuba to settle an estate, the gift of \$1,000 by the legatee was upheld. *Erwing v. Seigling*, Riley, Eq. 202; *Ruff v. Summers*, 4 Dev. 529. Annual accounts must be filed, and any omission to file them is a forfeiture of all commissions. *Benson v. Bruce*, 4 Dev. 464; *Edmonds v. Crenshaw*, Harp. 233; *Frazier v. Vaux*, 1 Hill, Ch. 203; *Wright v. Wright*, 2 McCord, Ch. 196. So if vouchers are not filed with the accounts. *Black v. Blakely*, 2 McCord, Ch. 8; *McDowell v. Caldwell*, id. 59. Trustees are subject to the same rules, except they are not required to file annual accounts. *Bonn v. Davant*, Riley, Ch. 44; *Muckenfoss v. Heath*, 1 Hill, Ch. 184; *Tanaux v. Ball*, 1 McCord, Eq. 458. But if they agree to serve without compensation, they are not entitled to commissions. *McCaw v. Blunt*, 2 McCord, Eq. 90; *Vestry, &c.*



was the intention that no compensation should be charged, none will be allowed.<sup>1</sup>

*v. Barksdale*, 1 Strob. 197. In *Sollee v. Croft*, 9 Rich. Eq. 474, a trustee was allowed for his personal services in going to Alabama to secure the trust property. A trustee is entitled to commissions upon sums paid to the *cestui* in his presence, on their joint receipt and upon a judgment in favor of the *cestui* in an action brought by herself and trustee. *Lanier v. Brunson*, 21 S. C. 41.

The statutes of Georgia are very similar to those of South Carolina. An executor forfeits all compensation if he neglects to make annual returns. *Fall v. Simons*, 6 Ga. 274; *Kenan v. Paul*, 8 Ga. 417. By act of Feb. 1850, 2 Cobb, Dig. 540, trustees are entitled to a commission: *Lowe v. Morris*, 13 Ga. 169; but not to encroach upon the *corpus* of the estate. *Burney v. Spear*, 17 Ga. 225. See *Price v. Cutts*, 29 Ga. 1+2.

In Alabama, compensation is allowed to trustees. *Spence v. Whitaker*, 3 Porter, 327; *Phillips v. Thompson*, 9 Porter, 669; *Bothen v. McColl*, 5 Ala. 314; *Carrol v. Moore*, 7 Ala. 617; *Benford v. Daniels*, 13 Ala. 613. No statute has determined the rate, and each case is left to depend upon the labor and trouble, and the amount of the estate. *Harris v. Martin*, 9 Ala. 899; *Gould v. Hayes*, 25 Ala. 432. Though five per cent commission is the ordinary allowance. *Bendell v. Bendell*, 24 Ala. 306; *Woodruff v. Snedecor*, 68 Ala. 442. But a *per diem* allowance may be made: *Marshall v. Halloway*, 2 Stewart, 453; *Magee v. Cowperthwaite*, 10 Ala. 968; or a gross sum. *O'Neil v. Donnell*, 9 Ala. 738. Expenses are also allowed. *Hearns v. Savage*, 16 Ala. 291. Compensation, however, is a matter of discretion, and may be withheld for misconduct. *O'Neil v. Donnell*, 9 Ala. 738; *Powell v. Powell*, 10 Ala. 914; *Gould v. Hayes*, 25 Ala. 432; *Hall v. Wilson*, 14 Ala. 295; *Doneldson v. Pusey*, 13 Ala. 752; *Lyon v. Foscue*, 60 Ala. 468. The special success of an investment is no reason for increase of pay. A reasonable allowance may be made for extra labor and counsel fees in instituting and prosecuting a suit for instructions; but services rendered by the counsel to any of the rival claimants cannot be charged to the trust funds. *Grimball v. Cruse*, 70 Ala. 534.

In Mississippi, an allowance of from five to ten per cent upon the amount of an estate upon final settlement is made. *Hutch. & How. Dig.* 414, § 96; *Merrill v. Moore*, 7 How. (Miss.) 292; *Cherry v. Jarratt*, 3 Cush. (Miss.) 221; *Shurtleff v. Witherspoon*, 1 Sm. & M. 622. These commissions are intended to embrace all the expenses of settling an estate. *Satterwhite v. Littlefield*, 13 Sm. & M. 306. There may be cases where an extra allowance will be made for legal expenses. *Cherry v. Jarratt*, 3 Cush. (Miss.) 221; *Shirley v. Shattuck*, 6 Cush. 26.

<sup>1</sup> *Northern Central R. R. Co. v. Keighton*, 29 Md. 572; *Mason v. Rosevelt*, 5 Johns. Ch. 534.

§ 919. The usual practice in relation to trusts is to allow trustees a commission upon the amount of the yearly income

In Florida, see *Merritt v. Jenkins*, 17 Fla. 593; *Muscogee Lumber Co. v. Hyer*, 18 id. 698.

In Tennessee, previous to 1822, no compensation to trustees for time and trouble or travelling was allowed, but reasonable costs for prosecuting and defending suits were allowed: *Stephenson v. Stephenson*, 3 Hayw. 123; *Bryant v. Pickett*, id. 225; *Stephenson v. Yandle*, 5 Hayw. 261; but since 1822, reasonable compensation is allowed. See act January 27, 1838. Five per cent on amount received and disbursed is a customary allowance to a receiver. *Stretch v. Gowdy*, 3 Tenn. Ch. 565. A trustee guilty of maladministration is not entitled to compensation: *Loveman v. Taylor*, 85 Tenn. 2; nor to attorney's fees in the case of litigation brought on by his own fault. *Solinsky v. Lincoln Sav. Bk.*, 85 Tenn. 369.

In Kentucky, the English rule of not allowing compensation for time and trouble was adhered to for a considerable time. *Hite v. Hite*, 1 B. Mon. 179; *Breckenridge v. Brooks*, 2 A. K. Marsh. 339; *McMullen v. Scott*, 2 Mon. 151. But it was altered by statute. 1 *Morehead v. Brown*, Dig. 668. Five per cent is allowed in some cases. *Logan v. Troutman*, 3 A. K. Marsh. 67; *Ramsey v. Ramsey*, 4 Mon. 152; *Wood v. Lee*, 5 Mon. 66; *McCracken v. McCracken*, 6 Mon. 342; *Webb v. Webb*, id. 167. In other cases, seven and one-half per cent, and in others ten per cent, has been allowed. *Wood v. Lee*, 5 Mon. 66; *Bowling v. Cobb*, 6 B. Mon. 358; *Floyd v. Floyd*, 7 id. 292. No sum is fixed as proper compensation for trustees, but a reasonable sum will be allowed. *Philips v. Bustard*, 1 B. Mon. 350; *Lane v. Coleman*, 8 id. 571; *Bank of United States v. Hirst*, 4 id. 439; *Greening v. Fox*, 12 id. 190. In *Fleming v. Wilson*, 6 Bush, 610, it was held that if a trustee had been faithful and skilful, and had been subjected to unnecessary litigation by the *cestui que trust*, a liberal compensation should be allowed him, and all his costs and expenses out of the trust fund.

In Ohio, under Act 1840, c. 208, § 175, Kerwin, Dig. 607, executors may receive commissions at the rate of six per cent upon the first thousand dollars, four per cent upon the next four thousand dollars, and upon all sums above five thousand dollars two per cent; and the court may make such further allowance for expenses and extra services as may seem reasonable. It has been thought that trustees do not come within the provisions of the act, and that they were not entitled to compensation in the absence of an agreement to that effect. *Gilbert v. Sutliff*, 3 Ohio St. 149. They shall be allowed their expenses; but if they refuse to account or misconduct themselves, their expenses may be disallowed.

In Illinois, executors may receive a commission not exceeding six per cent on the personal estate, and three per cent upon the money arising

received and paid out by them. This commission varies according to the rules in the various States. In some States, commissions are allowed for receiving and investing the principal fund, and another commission allowed at the close of the trust for the care of the fund and for paying it over or distributing it to the persons entitled.<sup>1</sup> Care is taken that double commissions are not allowed. In many States the commissions and compensation of the trustees depend upon their fidelity in the administration of the trust. If they are guilty of any breach of trust, or of any vexatious or improper conduct, the courts can withhold all compensation, or they can allow such compensation as will pay for the value of their services so far as they have been beneficial to the estate.<sup>2</sup> In some instances, compensation has been allowed and retained towards making good a breach of the trust.<sup>3</sup> In other States, it has been held that the trustees

from the sales of land, and such further allowances for expenses as are reasonable. 2 Rev. Stat. 1219, March 3, 1845, § 36. But trustees receive no compensation except under a special stipulation. *Constant v. Matteson*, 22 Ill. 546. But under this statute no allowance can be made for extra service in making journeys, etc., to collect claims, nor for service in organizing and working up a defence to a suit against the estate, nor for professional service in defending suit. *Hough v. Harvey*, 71 Ill. 72. A trustee has no vested interest in or lien on the trust property for his compensation which entitles him to retain the fund after breach of his bond. *Lee v. Pennington*, 7 Brad. (Ill.) 247.

In Missouri, executors are allowed commissions not exceeding six per cent on the personal estate and the sales of land. A gross sum may be allowed. *Fisher v. Smart*, 7 Mo. 581.

In Iowa, see *First National Bank v. Owen*, 23 Iowa, 185.

In California, professional services of the trustee must be paid for out of the income of the property. *Elling v. Naglee*, 9 Cal. 683.

In Oregon, trustees of an insolvent estate are entitled to reasonable compensation, but an agreement by said trustees with one of their number to conduct the business and to pay him a commission is void. *Kinney v. Heatley*, 13 Or. 35.

In Arkansas, see *Briscoe v. State*, 23 Ark. 592.

<sup>1</sup> In Pennsylvania, one and one-half per cent was allowed. *Luken's App.*, 47 Pa. St. 356.

<sup>2</sup> *Singleton v. Lowndes*, 9 S. C. 465.

<sup>3</sup> *Belknap v. Belknap*, 5 Allen, 472.

have a vested right to the commissions or compensation given by the statutes. But if the rate is named in the instrument of trust, it cannot be increased.<sup>1</sup>

<sup>1</sup> *Briscoe v. State*, 23 Ark. 592; *College of Charleston v. Wellington*, 13 Rich. Eq. 195.

## CHAPTER XXXII.

DETERMINATION OF THE TRUST AND DISTRIBUTION OF THE TRUST  
FUND.

## Determination of trust.

§ 920. Trusts may be terminated by decree upon the consent of all parties.

§ 921. How the responsibility of a trustee may be terminated.

## Distribution of funds and release of trustee.

§ 922. Whether trustees are entitled to a release and discharge.

§ 923. Effect of a release or discharge.

§ 924. Where the fund is distributed under a decree.

§ 925. If trustees pay to new trustees, they may insist upon a release.

§ 926. Trustees must see that the fund reaches the proper persons.

§ 927. Trustees are responsible for any mistake in that respect.

§ 928. Right of the trustees to a decree of the court.

§ 929. Trustees may pay the fund to agents and attorneys, but they must see to the validity of their authority to receive it.

§ 930. To what persons they may pay.

§§ 931, 932. Remedies in case they pay to the wrong parties.

§ 933. The cost of distributing the trust property must be paid out of the fund.

§ 920. THERE are two modes in which a trust may be terminated. (1) It may terminate upon the accomplishment of the purposes for which it was created. When the time expires during which a trust is to exist, or when the event happens upon which a trust is to cease, and the trustees have performed all their duties and distributed the fund as directed, the trust is at an end. It has been previously stated, that when the purposes of a trust are accomplished, conveyances from the trustees will be presumed after a sufficient lapse of time.<sup>1</sup> (a) If a trust ceases by expiration of time, and trustees are to divide real estate equally among the

<sup>1</sup> *Manice v. Manice*, 43 N. Y. 203; *Deering v. Tucker*, 55 Maine, 284.

(a) *Mackrell v. Walker*, 172 Penn. St. 154.

*cestuis que trust* entitled to the same, a conveyance to them as tenants in common is a performance of their duties and powers, and ends the responsibility of the trustees.<sup>1</sup> Sometimes the question of duration is somewhat doubtful, and it becomes very proper for the trustee to ask the opinion of the court upon the construction of the trust instrument.<sup>2</sup>

(2) Although a trust may not have ceased by expiration of time, and although all its purposes may not have been accomplished, yet if all the parties who are or may be interested in the trust property are in existence, and *sui juris*, and if they all consent and agree thereto, courts of equity may decree the determination of a trust and the distribution of the trust fund among those entitled.<sup>3</sup> A trust will not be continued merely that the trustee may continue to receive compensation from it. If the *cestuis* desire its termination it will not be maintained for the benefit of the trustee.<sup>4</sup> When the purposes named in the trust which are inconsistent with the full beneficial ownership and control of the *cestui* are fulfilled, so that the trustee holds the property on a simple trust, the *cestui* having the *absolute* equitable ownership of the fund, he is entitled to have the trust terminated.<sup>5</sup> (a) The same rule applies if it become impossible to carry out the trust.<sup>6</sup> (b) It was for some time doubtful whether a trust

<sup>1</sup> How *v.* Waldron, 98 Mass. 281; Emerson *v.* Cutler, 14 Pick. 114; Fisher *v.* Wigg, 1 P. Wms. 14; Cook *v.* Gardner, 130 Mass. 313.

<sup>2</sup> Hyde *v.* Wason, 131 Mass. 450.

<sup>3</sup> Stone, Petitioner, 138 Mass. 476, 479.

<sup>4</sup> Slater *v.* Hurlbut, 146 Mass. 308, 315.

<sup>5</sup> Sears *v.* Choate, 146 Mass. 395, 397; Whall *v.* Converse, *id.* 345.

<sup>6</sup> Hawthorn *v.* Root, 6 Bush, 501.

(a) Upon a grant of land to trustees in fee simple, the beneficiary named in the deed takes in fee. Holmes *v.* Holmes, 86 N. C. 205; Wilson *v.* Leary, 120 N. C. 90; Mitchell *v.* Murphy, 43 Fed. Rep. 425; Miller *v.* Cramer, 48 S. C. 282, 289; Kay *v.* Scates (Penn.), 78 Am. Dec. 399, and note.

in a trust fund coupled with a power of testamentary disposition cannot maintain a bill in equity to compel an absolute transfer to him of the fund held for him by a trustee under the will. Sise *v.* Willard, 164 Mass. 48.

(b) A trust may be void in its inception if the instrument creating it appoints the sole beneficiary the

One who has only a life interest

could be thus determined prior to the time contemplated by a testator; but it is now well settled that where all the parties are capable of acting, and desire to terminate the trust, courts can decree its determination.<sup>1</sup> (a) There can be no doubt upon principle, that, when all those who have the entire legal and beneficial interest in property agree to dispose of it in a particular manner, courts will give effect to their agreements. And so in case of a marriage settlement of a woman's property in trust for herself and her issue and her husband, and there were issue, and the marriage had been dissolved upon the libel of the wife, the court decreed the termination of the trust and the payment of the trust

<sup>1</sup> *Ante*, §§ 304, 520; *Bowditch v. Andrew*, 8 Allen, 339; *Smith v. Harrington*, 4 Allen, 566, 568; *Norris v. Thompson*, 4 Green, Ch. 314; *Inches v. Hill*, 106 Mass. 577; *Taylor v. Huber*, 13 Ohio St. 288; *Short v. Wilson*, 13 Johns. 53. But see *Walker v. Sharp*, 68 N. C. 363.

trustee, but this does not apply and the trust is not extinguished when, on the death or resignation of a testamentary trustee, the beneficiary is appointed trustee. *Losey v. Stanley*, 147 N. Y. 560; *Irving v. Irving*, 47 N. Y. S. 1052; *supra*, § 476 a, n. In Pennsylvania, it is held that if a trust for coverture fails because there is no marriage in fact or in contemplation, the active duties imposed on the trustee do not uphold the trust. *Kuntzleman's Trust Estate*, 136 Penn. St. 142; see *Quin's Estate*, 144 id. 444; 78 Am. Dec. 409.

(a) The English rule is otherwise, and there are still strong decisions to the contrary as to active trusts in America. *Douglas v. Cruger*, 80 N. Y. 15; *Lent v. Howard*, 89 N. Y. 169; *Cuthbert v. Chauvet*, 136 N. Y. 326; *Gunn v. Brown*, 63 Md. 96; *Leman v. McComas*, id. 153; *Oviatt v. Hopkins*, 46 N. Y. S.

959; *Kendall v. Gleason*, 152 Mass. 457; *Young v. Snow*, 167 Mass. 287; *Carney v. Kain*, 40 W. Va. 758; *In re Walkerly*, 108 Cal. 627. As the legal estate which the law vests in a trustee is property, a statute enabling the beneficiary to terminate the trust without his consent deprives him of property without due process of law. *Oviatt v. Hopkins*, 46 N. Y. S. 959.

When the trust is a personal confidence, the death of the trustee extinguishes it. *Young v. Young*, 97 N. C. 132; *Baker v. McAden*, 118 N. C. 740; see *Spence v. Widney* (Cal.), 46 Pac. 463; *Hadley v. Hadley*, 147 Ind. 423. So active, discretionary duties conferred upon executors cannot be exercised by an administrator with the will annexed. *Greenland v. Waddell*, 116 N. Y. 234; *Joralemon v. Van Riper*, 44 N. J. Eq. 299.

fund to the wife.<sup>1</sup> But in settlements where there are cross remainders or contingent interests which cannot be determined and adjusted until the happening of certain events, the trusts cannot be terminated, nor can the share of either one of the *cestuis que trust* be paid over to him.<sup>2</sup> If a trust is created for the life of one, it cannot be terminated before his death, although there are other words that imply that it may be terminated earlier.<sup>3</sup> If it is clear, however, that part of the principal of a fund is to be paid over to one of the *cestuis que trust* upon his arriving at the age of twenty-one, or upon any other event, the trust will terminate as to that part and continue as to others.<sup>4</sup> But a part of the *cestuis que trust* cannot terminate the trust.<sup>5</sup> Nor can it be determined by consent while it is still uncertain who will take under the bequest relating to the final distribution.<sup>6</sup> One *cestui* cannot demand a conveyance to himself in contravention of the agreement under which the trust was created.<sup>7</sup>

§ 921. The trustee may be discharged from the office and from future liability in several different ways. (1) The expiration or full performance of all the trusts, and a conveyance or transfer of the trust property according to the terms of the trust, is a discharge of the trustee.<sup>8</sup> (2) The trustee may be discharged by a decree of the court declaring, with the assent of all parties in interest, the trust at an end, and that the trustee shall distribute the fund.<sup>9</sup> (3) Although the trust is not determined, the trustee may be discharged from his office with the concurrence of all the *cestuis que trust*, if

<sup>1</sup> *Fussell v. Dowding*, L. R. 14 Eq. 423; *Wells v. Malbon*, 31 Beav. 48; *Wilkinson v. Gibson*, L. R. 4 Eq. 162; *Swift v. —*, L. R. 10 Eq. 15.

<sup>2</sup> *Prentice v. Hall*, 106 Mass. 597.

<sup>3</sup> *Schaffer v. Wadsworth*, 106 Mass. 19.

<sup>4</sup> *Walker v. Beal*, 106 Mass. 110.

<sup>5</sup> *Bancroft v. Lepieur*, 48 Mo. 418.

<sup>6</sup> *Brandenburg v. Thorndike*, 139 Mass. 102, 104.

<sup>7</sup> *Nichols v. Rogers*, 139 Mass. 146, 149.

<sup>8</sup> *Goodson v. Ellison*, 3 Russ. 593; *Holford v. Phipps*, 3 Beav. 434; *Tavenner v. Robinson*, 2 Rob. (Va.) 280.

<sup>9</sup> See *ante*, § 920. Or by an award of referees provided for in the deed of trust. *Cook v. Gardner*, 130 Mass. 313.



*sui juris*; and the appointment of a new trustee is not absolutely necessary to give validity to the discharge.<sup>1</sup> (a) (4) A trustee may be discharged, and a new one appointed, by virtue of a power to that effect contained in the instrument of trust.<sup>2</sup> (5) The death of a trustee operates to discharge his estate from all responsibility for acts done by his cotrustees or others after his decease.<sup>3</sup> (6) A trustee may be discharged by a decree of court, appointing another trustee, or giving such other directions to the trust as it sees fit.<sup>4</sup> (7) The sale of the trust estate under a prior incumbrance, or taking it from the trustee under a title paramount, puts an end to his duties and responsibility.<sup>5</sup> So a release by the trustee to the assignor, in an assignment for creditors, puts an end to the trust;<sup>6</sup> and a purchase of the trust estate by the trustee ends the trust, if the trustee is duly authorized to make the purchase.<sup>7</sup> A conveyance by the trustee to the *cestui que trust* merges the titles and determines the trust, where it is proper that such conveyance should be made; but if the *cestui que trust* is a minor, the trustee will<sup>8</sup> be holden, notwithstanding such conveyance.<sup>9</sup> So if the *cestui que trust* is a married woman, a conveyance to her by the trustee will not discharge him; but after the death of her husband such conveyance will discharge him.<sup>10</sup> A mere relinquishment of the trust, or of the property, which does not purport to convey the property to some person authorized to receive it, does not discharge the trustee.<sup>11</sup> But payment by the trustee to a person entitled to receive the money is a

<sup>1</sup> *Ante*, §§ 274, 285.

<sup>2</sup> *Ante*, §§ 288, 297.

<sup>3</sup> *Ante*, § 426.

<sup>4</sup> *Ante*, §§ 282, 283.

<sup>5</sup> *De Bevoise v. Sandford*, 1 Hoff. Ch. 195.

<sup>6</sup> *Huckabee v. Billingsly*, 16 Ala. 414.

<sup>7</sup> *Johnson v. Johnson*, 5 Ala. 90.

<sup>8</sup> *Waugh v. Wyche*, 23 L. J. Ch. 823.

<sup>9</sup> *Ante*, § 624.

<sup>10</sup> *Ante*, § 652; *Parker v. Converse*, 5 Gray, 336.

<sup>11</sup> *Dick v. Pitchford*, 1 Dev. & Bat. Eq. 480; *Richardson v. Cole*, 2

(a) *Anderson v. Simms*, 29 S. C. 247.

discharge of the trustee.<sup>1</sup> Mere neglect for a long time to administer a trust does not terminate it.<sup>2</sup>

§ 922. The discharge of a trustee, upon the determination of the trust, or upon the appointment of another trustee, does not of itself release the trustee from responsibility for his past conduct, and the *cestui que trust* may still inquire into his administration prior to his discharge;<sup>3</sup> and may require him to account for all his transactions.<sup>4</sup> Therefore it is usual, upon the final settlement and transfer of the trust property to the parties entitled, to discharge the trustee by a formal release of all claims executed by all the *cestuis que trust* who are *sui juris*. It seems to be a reasonable requirement, on the part of the trustee, when he parts with the fund and the muniments of title, and, in some sort, with the means of defence, that he should be secured against future litigation; for although the *cestuis que trust* may impeach such a receipt and discharge on the ground of fraud, accident, or mistake, yet it is *prima facie* evidence, and throws the burden upon those seeking to impeach it.<sup>5</sup> It has been determined, however, that where a *cestui que trust* has a clear right to a conveyance or transfer of the property, the trustee cannot demand a release, and refuse to make the transfer until it is given.<sup>6</sup> It has also been said, that, where trustees transfer the property in accordance with the terms of the instrument of trust, they are not entitled to a receipt or discharge, as a debtor, making a tender of payment of a debt owed by him, cannot demand a receipt;<sup>7</sup> but if they transfer the trust property to

Swan, 100; Diefendorf v. Spraker, 10 N. Y. 246; Waugh v. Wyche, 23 L. J. Ch. 833; Thatcher v. Candee, 3 Keyes, 157; Webster v. Vanderventer, 6 Gray, 429; Gilchrist v. Stevenson, 9 Barb. 9.

<sup>1</sup> Hayes v. Otely, L. R. 14 Eq. 4.

<sup>2</sup> Tainter v. Clark, 5 Allen, 66.

<sup>3</sup> Wright's Trusts, 3 K. & J. 419; Anon. v. Osborne, 6 Ves. 455.

<sup>4</sup> Clark v. Devereaux, 1 S. C. 172.

<sup>5</sup> Fowler v. Wyatt, 24 Beav. 232; Walker v. Symonds, 3 Swanst. 73.

<sup>6</sup> Fulton v. Gilmour, 8 Beav. 154; Hill on Trustees, 580; Chadwick v. Heatley, 2 Coll. 137; Wright's Trusts, 3 K. & J. 421; Warter v. Anderson, 11 Hare, 303.

<sup>7</sup> King v. Mullins, 1 Drew. 308.

the *cestuis que trust* in a manner or at a time not contemplated by the instrument, they may require a receipt and discharge.<sup>1</sup> Mr. Lewin criticises this distinction made by Vice-Chancellor Kindersley;<sup>2</sup> but it is obvious that the trustees cannot be compelled to transfer the property, except in the exact manner and upon the terms and at the time pointed out in the instrument of trust; if, therefore, the *cestuis que trust* agree that the trustees may depart from the terms of the instrument, they may require a release under seal, or even a bond of indemnity, and they may refuse to part with the fund until such security is given. It has been held, however, that an executor, in winding up and distributing an estate, is entitled to a release.<sup>3</sup> So where the title of the *cestui que trust* is not perfectly clear, or there is a possibility that there may be other claimants, or that the propriety of the conveyance or payment may be called in question at some future time, the trustees may require an indemnity against such future claims, or may refuse to convey without a decree of the court.<sup>4</sup>

§ 923. Of course, a person not *sui juris*, as an infant, cannot bind himself by a receipt, release, or bond of indemnity.<sup>5</sup> (a) If a release is executed to a trustee by a *cestui que trust* just after coming of age, the courts will investigate the transaction, and require evidence that the trustee took no advantage of his position and influence.<sup>6</sup> A release by the

<sup>1</sup> Ibid.; *Re Cater's Trust*, 25; Beav. 366; *Wright's Trusts*, 3 K. & J. 421.

<sup>2</sup> Lewin on Trusts, 289 (5th ed.).

<sup>3</sup> *King v. Mullins*, 1 Drew. 311; *Chadwick v. Heatley*, 2 Coll. 137.

<sup>4</sup> *Goodson v. Ellison*, 3 Russ. 583; *Re Primrose*, 23 Beav. 590; *Talbot v. Radnor*, 3 M. & K. 252; *Curteis v. Candler*, 6 Madd. 123; *Knight v. Martin*, 1 R. & M. 70; *Taml.* 237; *Taylor v. Glanville*, 3 Madd. 176; *Angier v. Stannard*, 3 M. & K. 566; *Campbell v. Horne*, 1 Y. & Col. Ch. 664; *Gardiner v. Downes*, 22 Beav. 397; *Merlin v. Blagrave*, 25 Beav. 137.

<sup>5</sup> *Overton v. Banister*, 3 Hare, 503.

<sup>6</sup> *Walker v. Symonds*, 2 Swanst. 69; *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41.

(a) See *Vaccaro v. Cicalla*, 89 Tenn. 63.

*cestuis que trust* will not be binding, unless the parties are made fully acquainted with their own rights, and the nature and full extent of the liabilities of the trustee.<sup>1</sup> Any concealment, misrepresentation, or other fraudulent conduct will vitiate such a release.<sup>2</sup> There should, therefore, be a full statement and detailed explanation of the accounts, which should be referred to in the receipt, release, or discharge, especially if there is anything in the nature of a breach of trust.<sup>3</sup> Even if the accounts are clearly stated, the release will be set aside, if there is any misapprehension as to the basis upon which they are made up.<sup>4</sup> As before stated, a release executed under proper advice, with ample time for mature deliberation, and upon full information, is *prima facie* valid; and the burden is upon the party disputing it to impeach it.<sup>5</sup>

§ 924. Where the trustee pays and distributes the trust fund under the direction and decree of the court, he is indemnified by the order itself, and needs no release. It would be impossible to hold any trustee responsible for obeying the orders of a court. It is, however, his duty to inform the court fully of all material facts within his knowledge; for a decree procured by any concealment or other management would be opened, and the trustee might be held responsible.<sup>6</sup>

<sup>1</sup> Ibid.; *Carter v. Trevelyan*, 8 Jur. 1015; 11 Cl. & Fin. 714; *Munch v. Cockerell*, 5 Myl. & Cr. 179.

<sup>2</sup> Ibid.; *Penobscot R. R. Co. v. Mayer*, 60 Maine, 306.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> *Re Sherwood*, 3 Beav. 338; *Portlock v. Gardner*, 1 Hare, 594; *Millar v. Craig*, 6 Beav. 433; *Fowler v. Wyatt*, 24 Beav. 232.

<sup>6</sup> *Waller v. Barrett*, 24 Beav. 466; *Farrell v. Smith*, 2 B. & B. 337; *Williams v. Headland*, 4 Gif. 495; *Fletcher v. Stevenson*, 3 Hare, 370; *Gillespie v. Alexander*, 3 Russ. 137; *Sawyer v. Birchmore*, 1 Keen, 401; *David v. Frowd*, 1 M. & K. 209; *Smith v. Smith*, 1 Dr. & Sm. 384; *Knatchbull v. Fearnhead*, 3 M. & Cr. 126; *Underwood v. Hatton*, 5 Beav. 39; *Bennett v. Lytton*, 2 John. & Hem. 155; *Low v. Carter*, 1 Beav. 426; *Moor's App.*, 10 Barr, 435; *Coventry v. Coventry*, 1 Keen, 758; *Greenwood v. Wakeford*, 1 Beav. 576.

§ 925. If the *cestuis que trust* create by agreement a new trust, and desire the trustees of the old trust to convey the property to new trustees under a new settlement, the old trustees may insist upon a receipt for the property; but whether they can insist upon a discharge from all past liabilities, or upon a general indemnity, is doubtful. Mr. Lewin says, that this requisition of the trustees is generally complied with, though it could not be enforced.<sup>1</sup>

§ 926. Trustees, and all other persons having money in their hands to distribute and pay over to other persons, must see that the money reaches the hands of the persons entitled to receive it; for if they make any mistake in the person to whom they pay the money, they are still liable to pay it to the proper person. (a) If a person borrows money of a trustee, and subsequently discovers that it is trust money, loaned in breach of the trust, he cannot safely pay it back, unless the trustee has the power of signing receipts.<sup>2</sup> If the trustee has notice of an assignment by the *cestui que trust*, he cannot safely pay to the assignor either principal or interest, although the assignment is in the nature of a mortgage only;<sup>3</sup> for notice to the trustee of the assignment is equivalent to

<sup>1</sup> Lewin, 289; Hill, 581; *Re Cater's Trusts*, 25 Beav. 356; Chadwick v. Heatley, 2 Col. C. C. 137; *Re Wright*, 3 K. & J. 419.

<sup>2</sup> *Sheridan v. Jones*, 7 Ir. Eq. 115; *Abbott v. Reeves*, 49 Penn. St. 494.

<sup>3</sup> *Cresswell v. Dewell*, 4 Gif. 460.

(a) When the purposes of a testamentary trust become exhausted, the balance of the trust fund remaining undisposed of is not covered by the will, and is to be distributed as if the testator had died intestate. *McCurdy's Appeal*, 124 Penn. St. 99; see *Beck's Appeal*, 116 id. 547.

In cases where the trust estate can be held liable upon the trustee's agreements, such recovery is a right to be subrogated to the trustee's

right to reimbursement for outlays and expenses out of the estate. See *Everett v. Drew*, 129 Mass 150.

Creditors assenting to the continuance of a business assigned by deed of trust are not liable for its debts as principals or as partners. *Wells-Stone Merc. Co. v. Grover*, 7 N. D. 460.

A trustee is not bound by a judgment against the beneficiary. *Roberts v. Yancey*, 94 Ky. 243.

taking possession by the assignee under a mortgage.<sup>1</sup> (a) Even if the deed is fraudulent and voidable, the trustee cannot pay to the assignor until it is avoided. On the other hand, it is said that the trustee may safely pay to the assignee, until the deed is impeached, especially if the assignee has the power of signing receipts.<sup>2</sup> If the *cestui que trust* is dead, payment is to be made to his personal representatives; and if the trustee refuses to make such payment, and involves himself in disputes over the *cestui que trust's* estate, he will be ordered to pay the costs of a suit for the recovery of the fund.<sup>3</sup> If the *cestui que trust* is a married woman, the property, if settled to her separate use, may be paid over to her; or if she is divorced, it may be paid to her as if her husband was dead.<sup>4</sup>

§ 927. If through any misapprehension on the part of a trustee, he makes a payment to a person not authorized by the terms of the trust to receive it, he will be held personally responsible for the misapplication,<sup>5</sup> to the persons who can establish a better right; and the advice of counsel will not protect him in making a wrong payment.<sup>6</sup> There is a *dictum* to the contrary in *Vez v. Emery*;<sup>7</sup> but this general rule prevails in England. But if trustees act in *good faith* in such case, and under the advice of counsel, the court will not impose costs.<sup>8</sup> In the United States the rule is not uniformly followed, and trustees who have acted in good faith

<sup>1</sup> Loveridge v. Cooper, 3 Russ. 58.

<sup>2</sup> Beddoes v. Pugh, 26 Beav. 407.

<sup>3</sup> Smith v. Bolden, 33 Beav. 262.

<sup>4</sup> Welles v. Malbon, 31 Beav. 48.

<sup>5</sup> Dodd v. Winship, 133 Mass. 359.

<sup>6</sup> Doyle v. Blake, 3 Sch. & Lef. 243; Peers v. Ceeley, 15 Beav. 209; Urch v. Walker, 3 M. & C. 705; Boulton v. Beard, 3 De G., M. & G. 608; Turner v. Maule, 3 De G. & Sm. 497; *Re Knight's Trusts*, 27 Beav. 49.

<sup>7</sup> 5 Ves. 141.

<sup>8</sup> Angier v. Stannard, 3 My. & K. 566; Dewey v. Thornton, 9 Hare, 232; Field v. Donoughmore, 1 Dru. & W. 234; Wade v. Dick, 1 Ired. 313; Freeman v. Cook, 3 Ired. 373.

(a) *In re Coleman*, 39 Ch. D. 443.

and under the advice of counsel have not been held responsible for errors of judgment or mistakes of law.<sup>1</sup> If the payment is to be made according to the laws of the domicil of the trustees, they must be taken to know the law, and, if they mistake the law, they are personally responsible;<sup>2</sup> but they are not bound to know the laws of foreign countries, unless called to their notice; if, therefore, they proceed in the ordinary manner, according to the *prima facie* line of their duty, they will be excused if they mistake the laws of foreign lands.<sup>3</sup> But as personal property is regulated by the law of the domicil of the owner, it is always safer for the trustee to inquire as to the law, if the *cestui que trust* is domiciled abroad; although he may not be liable for a mistake, if the difference between the laws of the two countries is not brought to his notice.<sup>4</sup>

§ 928. A trustee cannot be expected to incur the least risk in the distribution of the trust fund. Therefore, where there is a mere shadow of doubt as to the rights of the parties, he may require a bond of indemnity. Such a bond, however, is not very satisfactory, as the obligors may de cease and their property be divided long before there is a call upon them to indemnify the trustee; and if it appears that trustees have committed a breach of trust under cover of such a defence, the court shows no mercy.<sup>5</sup> Therefore, if a third person makes a claim, or if he refuses to state whether he has a claim, where the trustee has a right to know, the trustee may bring such person before the court by bill; and

<sup>1</sup> King v. Morrison, 1 P. & W. 188; Savings Fund's App., 76 Penn. St. 203; Neff's App., 57 id. 91; Bradley's App., 89 id. 514; Miller v. Proctor, 20 Ohio St. 444. During, King and Miller's App., 1 Harris, 224, in which Ch. J. Gibson says such a rule "would throw the execution of trusts into the hands of knaves and fools." But see Gilbert's App., 78 Penn. St. 270.

<sup>2</sup> Miller v. Proctor, 20 Ohio St. 444.

<sup>3</sup> Leslie v. Baillie, 2 Y. & Col. Ch. 91.

<sup>4</sup> See Chrichton's Trusts, 24 L. T. 267; *In re Blithman*, L. R. 2 Eq. 23; *Re Hellman's Will*, id. 363.

<sup>5</sup> Lewin, 253 (5th ed.).

if he claims improperly, or has improperly refused to answer, he will be charged with the costs.<sup>1</sup> So where the equities are not perfectly clear, the trustee may decline to act without the sanction of the court; and his costs and proper expenses will be allowed.<sup>2</sup> The trustee himself will be protected by the decree of any court having jurisdiction, and exercising the jurisdiction regularly, upon proper notice given;<sup>3</sup> but if he appeals from such decree to a higher court, he may be compelled to pay costs.<sup>4</sup> If other parties appeal, he must follow the case wherever it is carried, and he will be allowed his costs and expenses. The suit in such cases may be instituted by the trustee himself asking for the direction of the court; or parties claiming to be the *cestuis que trust* may institute the suit against the trustee, and others claiming to be the *cestuis que trust*. (a) If, at the hearing, it appears that the question was doubtful, and required the interposition of the court, all parties may have their costs out of the trust fund, although the decree may be against some of them.<sup>5</sup> But if parties receive the money who are not entitled, they are not protected, although the trustee

<sup>1</sup> *Re Primrose*, 23 Beav. 590.

<sup>2</sup> *Ante*, § 476 a; *Petition of Baptist Church*, 51 N. H. 424; *Wheeler v. Berry*, 18 N. H. 307; *Goodhue v. Clark*, 37 N. H. 531; *Att. Gen. v. Moore*, 19 N. J. Eq. 503; *Vanness v. Jacobs*, 2 Green, 153; *Woodruff v. Cook*, 47 Barb. 304; *Crosby v. Mann*, 32 Conn. 482; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Wiswell v. First Cong. Church*, 14 Ohio St. 928; *Talbot v. Radnor*, 3 My. & K. 252; *Goodson v. Ellison*, 3 Russ. 583; *Knight v. Martin*, 1 R. & M. 70; *Taml. 237*; *Angier v. Stannard*, 3 M. & K. 566; *Curteis v. Candler*, 6 Madd. 123; *Campbell v. Horne*, 1 Y. & Col. Ch. 664; *Gardiner v. Downes*, 22 Beav. 397; *Merlin v. Blagrove*, 25 Beav. 137; *Taylor v. Glauville*, 3 Madd. 176; *Loring v. Steineman*, 1 Met. 207.

<sup>3</sup> *Loring v. Steineman*, 1 Met. 207; *Tucker v. Horneman*, 4 De G., M. & G. 395; *Rowland v. Morgan*, 13 Jur. 23.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Westcott v. Culliford*, 3 Hare, 274; *Turner v. Frampton*, 2 Coll. 336; *Merlin v. Blagrove*, 25 Beav. 134; *Boreham v. Bignall*, 8 Hare, 134; *Lee v. Delane*, 1 De G. & Sm. 1.

(a) An accounting is necessary trustee at law for his share. *Husted before a distributee can sue the v. Thomson*, 39 N. Y. S. 971.



paid the money to them under a decree of the court, and is protected personally by the decree. In such cases the party really entitled, if he was not a party to the previous suit, and bound by the decree, may have his suit against the person to whom the money was paid, and he will be held as a *quasi* trustee in favor of the person who shows an absolute right to receive the money.<sup>1</sup>

§ 929. A trustee may pay the money to the parties entitled, or to an agent authorized to receive it; and such authority need not be shown by a power of attorney, nor by a deed, nor even by an order in writing: but a trustee should not pay over money without some proof in writing, signed by the parties, of the authority of the agent to receive it. So the trustee must see to the genuineness of the authority of the agent to whom he pays or transfers the property; for if there is forgery or fraud, or want of authority in the person to whom the property is transferred, the trustee will be responsible.<sup>2</sup> If the *cestui que trust* is abroad, payments are generally made by the trustee to an agent under a power of attorney; the death of the *cestui que trust* is a revocation of such agency or power, and the trustee is personally responsible for payments made afterwards, although without notice of the death. The *cestui que trust* may, however, direct the trustee to pay to a particular person until further orders; and such payments will be good, against the representatives of the *cestui que trust*, until notice of the death is given to the trustee:<sup>3</sup> but if the *cestui que trust* is a tenant for life only, such payments, made after his death, would not be good as against the remainder-man.<sup>4</sup> Mr. Lewin suggests that the

<sup>1</sup> *Kettleby v. Lamb*, 2 Ch. R. 404; *O'Brien v. Grierson*, 2 B. & B. 328; *Farrell v. Smith*, id. 337; *Foster v. McMahon*, 11 Ir. Eq. 308.

<sup>2</sup> *Bostock v. Floyer*, L. R. 1 Ch. 26; *Ashby v. Blackwell*, 2 Ed. 299; *Eaves v. Hickson*, 30 Beav. 136; *Sloman v. Bank of England*, 14 Sim. 475; *Harrison v. Pryse*, Barn. 324; *Ex parte Jolliffe*, 8 Beav. 168.

<sup>3</sup> *Vance v. Vance*, 1 Beav. 605; *Harrison v. Asher*, 2 De G. & Sm. 436; *Kiddill v. Farnelt*, 3 Sim. & Gif. 428.

<sup>4</sup> *Re Jones*, 3 Drew. 679. As to the presumption of death from seven years' absence unheard of, see *Doe v. Nepeau*, B. & Ad. 86; 2 M. & W.

safe course, where the *cestui que trust* is abroad, is for the trustee to remit the money to some reliable bank, to be drawn out on the personal checks or receipts of the *cestui que trust*.<sup>1</sup> The difficulty is remedied in England by Lord St. Leonards's act, which makes all payments by the trustee to a properly authorized person good and valid, in the absence of any notice of the death of the *cestui que trust*.<sup>2</sup>

§ 930. Where a trustee was to pay a small sum to a wife who had deceased, the court ordered it to be paid to the husband without administration;<sup>3</sup> and so where the trustee was to pay a small sum to a husband, the court ordered it to be paid to his widow, although there was no administration.<sup>4</sup> When the sum is considerable, the court will not hold the trustee justified in paying it over without administration, in case the person is deceased to whom it was to be paid.<sup>5</sup> So if the trustee is to pay to an infant, a guardian must be appointed to receive it; but if an infant fraudulently represents himself of age, and procures the money, the trustee will not be held liable to pay it again when the infant becomes of age.<sup>6</sup> If the trustee is to pay over to a firm or partnership, he may pay to the surviving partner or partners without the concurrence of the legal representatives of a deceased partner, although it is better to have such concurrence.<sup>7</sup> So a trustee may pay over to a single surviving trustee, although

894; *Re Phené*, L. R. 5 Ch. 139; *Re Lewes*, L. R. 6 Ch. 356; *Hickman v. Upsall*, L. R. 20 Eq. 136; 2 Ch. D. 617; *In the Goods of Nicholls*, L. R. 2 P. & D. 461; *Montgomery v. Beavan*, 1 Sawyer (Civ. Ct.), 653; *Burns v. Ford*, 1 Bailey (S. C.), 507; *Moore v. Smith*, 11 Rich. (S. C.) L. 569; *Jochumson v. Suff. Sav. Bank*, 3 Allen, 87; *Adams v. Jones*, 39 Ga. 479; *S. D. Lajoie v. Primm*, 3 Mo. 529.

<sup>1</sup> Lewin on Trusts, 285.

<sup>2</sup> 22 & 23 Vict. c. 35, § 26.

<sup>3</sup> *Hinnings v. Hinnings*, 2 Hem. & Mil. 32.

<sup>4</sup> Lewin on Trusts, 286.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Overton v. Bannister*, 3 Hare, 503; *Wright v. Snowe*, 2 De G. & Sm. 321; *Nelson v. Stocker*, 4 De G. & J. 458.

<sup>7</sup> *Phillips v. Phillips*, 3 Hare, 289.

the court in the exercise of its discretion does not order such payments to be made.<sup>1</sup>

§ 931. If a trustee by mistake pays the wrong person, and is compelled to pay again to the proper person, the court will not impose interest.<sup>2</sup> If he has overpaid a particular sum to a *cestui que trust*, he may recoup himself out of any other interest of that *cestui que trust* in the trust funds in his hands.<sup>3</sup> Where a trustee had paid wrong parties upon certificates forged by one of the *cestuis que trust*, the court ordered the wrong parties to repay what each had received, and also ordered the fraudulent *cestui que trust* to make up to the parties rightfully entitled, to the relief of the trustee, what should not be repaid.<sup>4</sup> In a suit against a trustee for breach of trust, the court ordered a tenant for life, who was overpaid by the breach of trust, to pay back the money to the trustee, without the institution of another suit for that purpose.<sup>5</sup> A *cestui que trust* may, notwithstanding the statute of limitations, if there has been no improper *laches*, recover from another *cestui que trust* an overpayment, erroneously made to him by the trustee.<sup>6</sup>

§ 932. But if an executor overpays a legatee, the court will not generally order him to refund, but will leave the parties to their legal rights;<sup>7</sup> especially if the executor pays voluntarily, and in spite of doubts expressed by the legatee.<sup>8</sup> Nor can the court order a purchaser from the legatee to refund to an executor, although the executor may be liable to creditors.<sup>9</sup> But an executor who has been made to pay a creditor,

<sup>1</sup> *Re Dickinson's Trust*, 1 Jur. (N. S.) 724.

<sup>2</sup> *Saltmarsh v. Barrett*, 31 Beav. 349.

<sup>3</sup> *Livesay v. Livesay*, 3 Russ. 287; *Dibbs v. Goren*, 11 Beav. 483.

<sup>4</sup> *Eaves v. Hickson*, 30 Beav. 136.

<sup>5</sup> *Hood v. Clapham*, 19 Beav. 90; *Baynard v. Woolley*, 20 Beav. 583; *Davies v. Hodgson*, 25 Beav. 177; *Griffiths v. Porter*, id. 236; *Moore v. Moore*, 1 Coll. 54.

<sup>6</sup> *Harris v. Harris*, 29 Beav. 110.

<sup>7</sup> *Downes v. Bullock*, 25 Beav. 54; *Neal v. Maxwell*, 40 Miss. 726.

<sup>8</sup> *Bate v. Hooper*, 5 De G., M. & G. 338.

<sup>9</sup> *Noble v. Brett*, 24 Beav. 499.

and has under his control a legacy appropriated by him as such, and not actually paid over, may be allowed to recoup the debt from such legacy;<sup>1</sup> but he is not entitled to his costs for obtaining such relief.<sup>2</sup> A creditor who is not barred by the statute of limitations, or to whose suit the statute is not pleaded, may recover assets from a legatee to whom they have been improperly paid by an executor;<sup>3</sup> although such legatee holds in trust,<sup>4</sup> but he cannot recover them from purchasers for value, as from persons claiming under a marriage settlement.<sup>5</sup>

§ 933. The costs of winding up a trust and distributing the money, and all expenses for documents, deeds, and other papers, must be paid from the trust fund.

<sup>1</sup> Ibid.

<sup>2</sup> *Noble v. Brett*, 26 Beav. 233.

<sup>3</sup> *Fordham v. Wallis*, 10 Hare, 217.

<sup>4</sup> *Jervis v. Wolferstan*, L. R. 18 Eq. 18.

<sup>5</sup> *Dilkes v. Broadmead*, 2 Gif. 113; 2 De G., F. & J. 566.

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